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CASES

ON

THE LAW OF TORTS.

To accompany this volume.

ELEMENTS OF THE LAW OF TORTS, FOR STUDENTS.
By Melville M. Bigelow, Ph.D. Fifth edition, revised.

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CASES ON TORTS

TO ACCOMPANY THE EDITOR'S WORK
ON THAT SUBJECT

EDITED BY
MELVILLE M. BIGELOW

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BOSTON
LITTLE, BROWN, AND COMPANY
1895

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University Press :
John Wilson and Son, Cambridge, U. S. A.

NOTE.

The cases contained in this volume are selected to accompany the editor's work on the Law of Torts, of the Students' Series; and they follow the order of the text of that book.

The editor has generally rewritten the headnotes of the cases, putting them of set purpose in the form of briefly-stated rules of law. The headnotes thus furnish a text for what follows, and help to make the report of the case complete after the manner of original law reports. They cannot tempt the student to cut short his work and take them as a substitute for what follows, or even as an epitome of it, for the deduction of rules is no more than an incident of the study of cases.

Statements of fact, too, when not contained in the opinion, have often been rewritten, especially when clearness and space could be gained. Matter foreign to the subject in hand has been omitted, as well from the opinion as from the statement preceding, where, and only where, the omission could not affect the completeness of what was left.

The report of a case usually consists of five separable parts; and to bring about the best results the report

should be studied accordingly, part by part, in natural order. The parts, and their order of sequence, are these : —

1. Nature of the action (*e. g.*, action for deceit).
2. Essential facts.
3. Point or points in dispute.
4. Decision.
5. Ground of decision.

Taking up the work accordingly, the student should not leave a case until he can state it, without hesitation, clearly and effectively from beginning to end.

Boston, *August*, 1895.

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CASES ON TORTS.

DECEIT.

PASLEY *v.* FREEMAN.

King's Bench of England, Hilary Term, 1789, 3 T. R. 51.

A false representation intended to deceive, and deceiving with damage, is actionable.

This was an action in the nature of a writ of deceit, to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made for a new trial, and, that being refused, another in arrest of judgment.

The third count alleged in substance that the defendant, intending to deceive and defraud the plaintiffs, and knowing the contrary to be true, falsely and fraudulently represented to the plaintiffs that one J. C. Falch was a person safely to be trusted in the purchase on credit of sixteen bags of cochineal; that the plaintiffs, not knowing that the representation was false, but believing it to be true, were induced to sell to said J. C. F. sixteen bags of cochineal on credit; and that neither said J. C. F. nor any one else has ever paid for the same; to the damage of the plaintiffs, &c.

Grose, J.[1] — Upon the face of this count in the declaration, no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with

[1] Dissenting.

them; but he knowingly asserted a falsehood, by saying that Falch might be safely intrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was[1] damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent; but it is insisted that the law recognizes principles on which it may be supported. The principle upon which it is contended to lie is that, wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert, and shall endeavor to show that, in every case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground that there exists in this case what the law deems damnum cum injuria. If it does, I admit that the action lies; and I admit that upon the verdict found the plaintiffs appear to have been damnified. But whether there has been injuria, a wrong, a tort, for which an action lies, is a matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. Deceit, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and

[1] Sic, for plaintiffs were.

Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true, which is misrepresented; and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time for a supposed injury, which has been daily committed for centuries past. For I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others; and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put. Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it, he discovers the defect, and sells the estate for less than he gave: why may not an action be brought for the loss upon any principle that will support this action? And yet such an action has never been attempted. Or suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and sure-footed, when, in fact, the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller, and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he do not pay for the goods, I will;" for then, undoubtedly, an action would not have lain against the defendant. Other and stronger cases may be put of actions that must necessarily spring out of any principle, upon which this can be supported, and yet which were never

thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases, in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is where the affirmation is that the thing sold has not a defect which is a visible one; there the imposition, the fraudulent intent, is admitted, but it is no tort. The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion, such as the party deceived may exercise his own judgment upon; as where it is matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; Bayly *v.* Merrel. In Harvey *v.* Young, Yelv. 20, G. S., who had a term for years, affirmed to F. D. that the term was worth £150 to be sold, upon which F. D. gave £150, and afterwards could not get more than £100 for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Roll. Abr. 101, are recognized in 1 Sid. 146. How, then,

are the cases? None exist in which such an action as the present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie; not even a dictum. But from the cases cited some principles may be extracted to show that it cannot be sustained: 1st. That what is fraud, which will support an action, is matter of law. 2d. That in every case of fraudulent misrepresentation, attended with damage, an action will not lie even between contracting parties. 3d. That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him credit; but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own, to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in Yelverton respecting the value of the term. But at any rate, it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this the plaintiffs might have inquired of others, who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as

in the case of Bayly *v.* Merrel. I am, therefore, of opinion that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

Buller, J. — The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And the question is, whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per Croke, J., 3 Bulst. 95. But it is contended that this was a bare, naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud; and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel, who originally made the motion, that no action could be maintained unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare, naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are Yelv. 20, Carth. 90, Salk. 210. The first of these has been fully stated by my brother Grose; but it is to be observed that the book does not affect to give

the reasons on which the court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the court went on a distinction between the words 'warranty' and 'affirmation,' the case is not law; for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended. But the true ground of that determination was that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment, or opinion, in such cases, implies no knowledge. And here this case differs materially from that in Yelverton: my brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in Yelverton admits that, if there had been fraud, it would have been otherwise. The case of Crosse *v.* Gardner, Carth. 90, was upon an affirmation that oxen which the defendant had in his possession, and sold to the plaintiff, were his, when in truth they belonged to another person. The objection against the action was that the declaration neither stated that the defendant deceitfully sold them, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. Ex concessis therefore if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But, notwithstanding these objections, the court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held that affirming them to be his, knowing them to be a stranger's, is the offence and cause of action. The case of Medina *v.* Stoughton, Salk. 210, in the point of decision,

is the same as Crosse *v.* Gardner; but there is an obiter dictum of Holt, C. J., that where the seller of a personal thing is out of possession, it is otherwise; for there may be room to question the seller's title, and caveat emptor in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and, if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases, then, are so far from being authorities against the present action, that they show that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion, then, is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment; but if one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of Risney *v.* Selby, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was £30 per annum, when it was only £20 per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated; nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the

defendant knew that what he asserted was false. And, by the words of the book, it seems that, if the tenant had said the same thing, he also would have been liable to an action. If so, that would be an answer to the objection that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the dictum or inference which may be collected from that case. If A, by fraud and deceit, cheat B out of £1000, it makes no difference to B whether A or any other person pockets that £1000. He has lost his money; and, if he can fix fraud upon A, reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and, upon that, B buys them, when in truth they are the goods of another, yet, if he sell them, fraudulently and falsely, on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them, knowing them to be the goods of the stranger, yet B shall have an action for this deceit. It is not clear from this case whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person: what is said at the end of the case only proves that ' falsely ' and ' fraudulently ' are equivalent to ' knowingly.' If the first were the fact in the case, namely, that he had no authority, the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for, his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For, in 1 Roll. Abr. 100, pl. 1, it was held, that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name of my land, this shall bind me forever; and, therefore, I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognizance, statute-merchant or staple, there is no foundation for supposing that in that case the person acknowledging the fine

or judgment was the same person to whom it was so acknowledged. If that had been necessary, it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Roll. Abr. 95, pl. 25, it is said, 'If my servant lease my land to another for years, reserving a rent for me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances, if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty.' Here, then, is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425; but no notice is taken of this point, probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration that, if there were any fraud, the nature of it is not stated. To this the declaration itself is so direct an answer, that the case admits of no other. The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here, then, is the fraud and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for 'fraudulenter' without 'sciens,' or 'sciens' without 'fraudulenter,' would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant

knew it to be so: by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for if a man who is asked a question respecting another's responsibility hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbor, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of Coggs *v.* Barnard, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books which, though not much to be relied on,

yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In Rex *v.* Gunston, 1 Str. 589, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the court refused to grant a certiorari, unless a special ground were laid for it. If the assertion in that case had been wholly innocent, the court would not have hesitated a moment. How, indeed, an indictment could be maintained for that I do not well understand; nor have I learnt what became of it. The objection to the indictment is that it was merely a private injury; but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, even though it be under the specious pretence of serving his friend, I say 'ausis talibus istis non jura subserviunt.'

Ashhurst, J. — The objection in this case, which is to the third count in the declaration, is that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in Bayly *v.* Merrel, 3 Bulstr. 95, is a sound and solid principle, namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power, namely, by weighing the goods; and therefore it was a foolish credulity, against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true; but non constat that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons

may occur why the defendant might know that fact better than the plaintiffs; as if there had been before this event subsisted a partnership between him and Falch, which had been dissolved; but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action, as in Risney *v.* Selby, which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not, unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position; but if there were any such to be found, I should not hesitate to say that it could not be law, for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it: what is it to the plaintiff whether the defendant was or was not to gain by it? the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that if this be determined to be law, any man may have an action brought against him for telling a lie, by the crediting of which another happens eventually to be injured. But this consequence by no means follows; for in order to make it actionable it must be accompanied with the circumstances averred in this count, namely, that the defendant, ‘ intending to deceive and defraud the plaintiffs, did deceitfully encourage and per-

suade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act.' Any lie accompanied with those circumstances I should clearly hold to be the subject of an action; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon; for the quo animo is a great part of the gist of the action. Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence, as it was two centuries ago; if it were not, we ought to blot out of our law-books one fourth part of the cases that are to be found in them. The same objection might in my opinion have been made with much greater reason in the case of Coggs *v.* Barnard; for there the defendant, so far from meaning an injury, meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And indeed the principle of the case does not in my opinion seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore I think the rule for arresting the judgment ought to be discharged.

Lord Kenyon, C. J. — I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All laws stand on the

best and broadest basis which go to enforce moral and social duties. Though, indeed, it is not every moral and social duty the neglect of which is the ground of an action. For there are, which are called in the civil law, duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord Ch. B. Comyns,[1] that 'an action upon the case for a deceit lies when a man does any deceit to the damage of another.' He has not, indeed, cited any authority for his opinion; but his opinion alone is of great authority, since he was considered by his contemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases on this subject. In 3 Bulstr. 95, it was held by Croke, J., that 'fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur, there an action lieth.' It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. Dodderidge, J., said: 'If we shall give way to this, then every carrier would have an action upon the case; but he shall not have any action for this, because it is merely his own default that he did not weigh it.' Undoubtedly, where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence. And, in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the court held that the action was not maintainable. Then, how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence

[1] Com. Dig. tit. 'Action upon the case for a deceit,' A. 1.

inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them; and the law of morality ought to induce them to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's credit but by an application to his neighbors. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For a person does not have recourse to common conversation to know the title of an estate which he is about to purchase; but he may inspect the title-deeds; and he does not use common prudence if he rely on any other security. In the case of Bulstrode, the court seemed to consider that damnum and injuria are the grounds of this action; and they all admitted that, if they had existed in that case, the action would have lain there; for the rest of the judges did not controvert the opinion of Croke, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie; but that proposition is to be taken sub modo. If, indeed, no injury is occasioned by the lie, it is not actionable; but if it be attended with a damage, it then becomes the subject of an action. As calling a woman a whore, if she sustain no damage by it, is not actionable; but if she lose her marriage by it, then she may recover satisfaction in damages. But in this case the two grounds of the action concur: here are both the damnum et injuria. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false assertion which is stated on the record, by which they sustained a considerable damage. Then, can a doubt be entertained for a moment but

that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then, as to the loss: this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly 'fraudulenter,' did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral and detrimental to society. And I am of opinion that the action is maintainable on the grounds of deceit in the defendant, and injury and loss to the plaintiffs.

Rule for arresting the judgment discharged.

CHRYSLER *v.* CANADAY.

Court of Appeals of New York, 1882. 90 N. Y. 272.

False statements of the value of property by the vendor *may* be actionable; but not when artifice was not employed either to prevent inquiry or otherwise to cheat the purchaser.

Action for damages for false representations of the value and income of property, land and bonds, conveyed by the defendant to the plaintiff in exchange for land conveyed by the plaintiff to the defendant. Verdict for the plaintiff, affirmed by judgment of the General Term. The case turned upon charges to the jury, given and refused, to which the defendant excepted, as shown in the opinion of the court.

Miller, J., for the court. — The most important questions which arise upon this appeal relate to the charge of the judge to the jury upon the trial, and to his refusals to charge several requests made by the counsel for the appellant, to each of which rulings an exception was taken.

The judge charged that 'if the defendant knowingly and wilfully made a false statement as to the value of the property which was conveyed to the plaintiff, the plaintiff can maintain this action.' He further stated that 'if he, knowing them [the statements made] to be untrue, makes them

with the intention of misleading the vendee, and if the latter, relying upon them, is misled to his injury, he may avoid the contract or recover damages for the injury.' The rule stated was repeated in substance in language of a similar import, and several requests to charge were made and refused embodying a contrary proposition and relating to statements made as to specific portions of the property sold, and also to the effect that when the property is seen and examined by a person negotiating for the purchase or exchange he must rely upon his own judgment and opinion as to the value and worth, and has no right to rely upon the statement of the person offering the same for sale or exchange. Some other requests to charge were also made and refused which involved the same principle.

The charge as made, and the refusals to charge to which exceptions were severally taken, may properly be considered as presenting the point as to the nature, extent, and character of the liability which is assumed by a vendor in entering into a contract with the vendee for the sale of real estate which the latter has seen, partially examined, but the value of which is far less than what is represented, and the representation is falsely made by the vendor for the purpose of obtaining a higher price for the property, and it is purchased by the vendee, after his examination, in reliance upon the correctness of the statements made.

The questions presented by the exceptions to the charge as made and the refusals of the judge to charge as requested are not unfamiliar to the courts of this State, and have been the subject of frequent consideration. In Simar *v.* Canaday, 53 N. Y. 298; 13 Am. Rep. 523, a leading case, an action was brought to recover damages for a fraud alleged to have been committed, upon the sale of real estate, by inducing the plaintiff to convey to the defendant certain other real estate for which the plaintiff agreed to receive in part payment certain bonds and mortgages which were alleged to be worthless. In the opinion of the court by Folger, J., the question was considered whether the state-

ments made by the defendant were mere matters of opinion and belief, and it is there laid down that ' if they were such, no liability is created by the utterance of them; but all statements as to the value of the property are not such. They may be, under certain circumstances, affirmations of fact.' ' When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them and is misled to his injury, they avoid the contract. Stebbins *v.* Eddy, 4 Mason, 414–423. And where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damages sustained.'

These remarks must be considered in the light of the facts appearing in the case cited, and an examination of the record shows that there was evidence that the mortgages taken in exchange for the land sold were upon land located at a distance, which the plaintiff had not seen, and as to the value of which he knew nothing; that although the plaintiff proposed and the defendant agreed to go and see it, and several appointments were made for that purpose, the defendant did not fulfil them, and finally told the plaintiff that it was not necessary for him to go and examine the land, that he would take his word for it that it was just as he said.

There was also testimony showing that the defendant made representations as to the former and the then existing condition of the land, what it had previously sold for, and its value, which were alleged to be false. It will thus be seen that there was proof tending to establish that the defendant fraudulently attempted to induce the plaintiff to refrain from examining the land himself and place reliance upon the defendant's statements as to its condition and value, and hence what was said by the learned judge had reference to this element in the case. While therefore the general rule is laid down as to statements made which were known to be untrue, it is qualified and restricted where the vendee has

not equal means of knowledge, and where he is induced to forbear inquiries which he otherwise would have made. That this is a correct interpretation of the opinion in the case cited is supported by the decision of this court in the subsequent case of Ellis *v.* Andrews, 56 N. Y. 83; 15 Am. Rep. 379, where it is held that a false statement of the value of property by the vendor, made for the purpose of obtaining a higher price than he knew it was worth, will not sustain an action for fraud, by the purchaser who contracts relying upon such statements. It is laid down in the opinion by Grover, J., that upon the question of value the purchaser must rely upon his own judgment, but in regard to any extrinsic fact affecting the quality or value of the subject of the contract he may rely upon the assurances of the vendor, and if he does so rely and those assurances are fraudulently made, to induce him to make the contract, he may maintain an action for the injury sustained. In Simar *v.* Canaday inducements were held out which may have prevented the plaintiff from examining the property and caused him to rely upon the word of the defendant, and if they were fraudulent the action could properly be upheld upon that ground.

If in the case at bar the evidence introduced established that the plaintiff was, by the artifice or fraud of the defendant, induced to refrain from an examination of the property, and relied upon the assurances made to him, the action upon that ground could be upheld.

We are unable to discover any conflict between Simar *v.* Canaday and Ellis *v.* Andrews, and we think that the two cases upon principle are entirely reconcilable. Nor is it apparent that the rule laid down in the latter case is inconsistent with any of the decisions of this court cited by the respondent's counsel, all of which have been carefully examined and considered.

The rule is well settled that a naked assertion by a vendor of the value of property offered for sale, even though untrue of itself and known to be such by him, unless there is a want

of knowledge by the vendee and the sale is made in entire reliance upon the representations made, or unless some artifice is employed to prevent inquiry or the obtaining of knowledge by the vendee, will not render the vendor responsible to the vendee for damages sustained by him.

In this case there are facts proven which show artifice and conspiracy from the outset on the part of the defendant to cheat and defraud the plaintiff, who was put in communication with parties who aided in carrying out the deception and putting him under the influence of confederates who acted in collusion and with the palpable purpose to deceive and defraud him. The facts referred to would undoubtedly have great effect upon a jury, and if properly presented would justify a verdict for the damages sustained. But in the charge to which exception was taken the jury were at liberty to dismiss these considerations from their minds, and the charge as made and excepted to went far beyond what was authorized, and was therefore erroneous.

As there was error in the charge as made in the respect indicated, it is not necessary to consider in detail the several requests to charge which were refused, and it is sufficient to say that so far as any of them presented a proposition in relation to the statements made, adverse to that portion of the charge which has been considered, such refusal was also erroneous.

A serious question arises in regard to the charge of the judge to the effect that the jury might give, in a clear case, such damages by way of punishment as they thought the conduct of the defendant deserved. Also that when one man defrauds his neighbor wilfully and deliberately, the jury can, if they see fit, mark the conduct of the defendant by giving a sum over and beyond the actual damages which the party defrauded has sustained, by way of punishment for the conduct of the defendant.

Inasmuch as a new trial must be granted for the error committed by the judge upon the trial, which has already been considered, we do not deem it necessary to pass upon

the question presented as to the right of the plaintiff in an action where a wilful and deliberate fraud has been committed, to recover exemplary or punitive damages.

The other questions presented upon this appeal have been examined and considered, but we are unable to discover that any error was committed in any of the rulings of the judge in respect to the same, and for the error of the judge in his charge, which has been discussed, the judgment should be reversed and a new trial granted, with costs to abide the event. *Judgment reversed.*

See note to Smith *v.* Land and House Corporation, post, p. 33.

MEDBURY *v.* WATSON.

Supreme Court of Massachusetts, September, 1843. 6 Met. 246.

Deceit can be maintained for a false representation, made by a stranger to the title of land, of what the land has already sold for.

Action for deceit with verdict for the plaintiff. The case is stated in the opinion of the court.

Hubbard, J., for the court. — The defendant moves in arrest of judgment, on the ground that no action can be maintained upon the allegations in the writ. The allegations are in substance these: that the plaintiffs, wishing to purchase a tannery for the purpose of carrying on a joint business in the making and vending of leather, inquired of the defendant, if he could inform them where they could purchase such an establishment; that the defendant, intending to deceive and defraud them, and to induce them to purchase a tannery in Worthington, belonging to one Thomas D. Wasson, and to give a much greater sum for it than it was worth, falsely asserted and affirmed to them, that he knew of such a tannery as they wanted, belonging to Thomas D. Wasson, who was ready to sell it, and that it

could be purchased for $4000, being the same sum which said Thomas D. paid one James Wasson for it; and that he would aid the plaintiffs in making the purchase; at the same time knowing that Thomas D. Wasson paid only $3000 for it, and that it was not worth that sum at the time when Thomas D. purchased, nor at the time of his (the defendant's) making the false representation; that he wrongfully and deceitfully encouraged them to make the purchase, and pay for it a much larger price than it was worth, namely, $4000; and that the plaintiffs, confiding in his false assertions and affirmations, and believing them to be true, and being ignorant of the value of the property, made the purchase, &c. The evidence fully sustained all the allegations in the writ; but the question is, whether these facts, as thus alleged and proved, are in themselves actionable.

The action on the case for deceit is one well known; and, for a long series of years, has been maintained in the English courts. It has also been sustained by us as an efficient means for the punishment of frauds, and for the protection of the weak and the ignorant against the designs and artifices of the crafty.

The leading case, in modern times, on the subject of false affirmations made with intent to deceive, is that of Pasley *v.* Freeman, 3 T. R. 51,[1] in which it was decided that a false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff received damage, was the ground of an action upon the case in the nature of deceit; and that it was not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who received the benefit. This case, though much contested, and though often attempted to be shaken, has received the sanction of successive decisions in Westminster Hall and in the courts of different States in this country. It has, indeed, been modified by the Act of 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, so far as to require the assertions, in regard to the credit of a third person, to

[1] Ante, p. 1.

be in writing, before the party can be charged on his false affirmation; and the law has been modified in like manner here, by St. 1834, c. 182, § 5, and by the Rev. Sts. c. 74, § 3. The great principle, however, on which that case rests, has not been disturbed, but is, indeed, sanctioned by the very statute provisions and limitations in respect to it.

But in actions on the case for deceit, founded upon false affirmations, there has always existed the exception, that naked assertions, though known to be false, are not the ground of action, as between vendor and vendee; and in regard to affirmations and representations respecting real estate, the maxim of caveat emptor has ever been held to apply. When, therefore, a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it; such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable. They are the mere affirmations of the vendor, on which the vendee cannot safely place confidence, and will not excuse his neglect in not examining for himself, and ascertaining what the facts are, and what credit is to be given to the assertions. But even this is qualified by one of the more ancient decisions: as where a vendor had falsely affirmed as to the amount for which the estate rented, and had induced a person to give a higher price for the estate in consequence of such false affirmation respecting the rent, there an action was held to lie, on the ground that it was a matter within his own knowledge, and the tenant might not disclose the amount of rent paid by him. Elkins *v.* Tresham, 1 Lev. 102; 1 Sid. 146. And so fraudulent misrepresentations of particulars in relation to the estate, which the buyer has not equal means of knowing, and where he is induced to forbear inquiries that he otherwise would have made, are not to be viewed in the light of assertions gratis dicta; and, therefore, where damage ensues, the party guilty of the fraud will be liable for the injury sustained.

I do not think it necessary to go over, in detail, the

authorities cited by the counsel for the defendant, they having often been the subject of comment; but I presume I am safe in affirming that the greater part, if not all, the cases cited, are those of false affirmation by the vendor to the vendee, where the maxim caveat emptor applies, and not those resting upon the false representations of a third person with regard to the value of the property. And the distinction between the two cases is marked and obvious. In the one, the buyer is aware of his position; he is dealing with the owner of the property, whose aim is to secure a good price, and whose interest it is to put a high estimate upon his estate, and whose great object is to induce the purchaser to make the purchase; while in the other, the man who makes the false assertions has apparently no object to gain; he stands in the situation of a disinterested person, in the light of a friend, who has no motive nor intention to depart from the truth, and who thus throws the vendee off his guard, and exposes him to be misled by the deceitful representations.

In the present case, we think the averments in the declaration would not have supported an action, if the false representations had been made by the vendor to the vendees. But the representations were made by a third person, apparently disinterested, and who proposed to aid the plaintiffs in making the purchase, and to procure the estate for them for a price which he stated he knew that it cost, and which he affirmed it was worth. Such false affirmations and representations having been made by a third person, with the intent to defraud, we hold are actionable; and though the declaration might have contained a more full averment of the facts expected to be proved, yet we are of opinion that sufficient was stated to maintain the action, and to let in the other proofs connected with and growing directly out of the assertions set forth in the declaration.

For these reasons, the motions for a new trial, and in arrest of judgment, are overruled, and there must be

Judgment on the verdict.

SMITH *v.* LAND AND HOUSE CORPORATION.

Court of Appeal, England, 1884. 28 Ch. D. 7.

'F. is a very desirable tenant,' implies that the person saying so knows nothing to the contrary, and so is a statement of fact.

A purchaser of property may rely and act upon the vendor's representations in regard to it, though the purchaser has examined the property and received an unfavorable impression.

Appeal from a judgment by Mr. Justice Denman in favor of the defendants. The action was for specific performance of a contract of sale of a freehold hotel in Walton-on-the-Naze, at first offered for sale at auction by the plaintiffs, with printed particulars set out by the auctioneer, but, no sale being then effected, directly afterwards contracted for at private sale by the contract in suit, under circumstances stated below by Lord Justice Baggallay.

The defendants, on learning that the property was for sale, sent their secretary to see the property and report. He visited the place and reported as follows: 'The hotel has been built over forty years, and up to a recent period enjoyed a high reputation as a respectable and thriving hotel. Mr. Fleck, the landlord, from the amount of business he is now doing, can scarcely pay the amount of rent with rates and taxes. It seems to be a mystery in the town itself how Mr. Fleck, with his eyes open, could have been induced to take the hotel at the present rental. The only thing that I can see that can be done with the hotel to make it pay as an investment would be to make the small theatre into a kind of music-hall, and to convert the billiard-room into a kind of casino. The town itself seems to be in the very last stage of decay, from beginning to end.' This report was read at a meeting of a committee of the defendants, presided over by Mr. Alderman Knight, which authorized the purchase of the property at a sum larger than was, in fact, paid.

BAGGALLAY, L. J. — On the 4th of May, 1882, the plaintiffs entered into a contract with the defendants for the sale to them of certain property described in particulars of sale. The property had been offered for sale by auction, but no sale was effected, and, immediately afterwards, this contract was entered into. The purchasers declined to complete, saying that they had been induced by misrepresentation to enter into the contract. Early in October, 1882, this action was commenced by the vendors for specific performance. It was met by a statement of defence, accompanied by a counter-claim for rescission of the contract or compensation. The foundation of the counter-claim is that the property was first described, in the particulars, as held by Fleck, 'a very desirable tenant,' and then again as 'let to Mr. F. Fleck (a most desirable tenant) at a rental of £400 per annum, for an unexpired term of twenty-seven and a half years, thus offering a first-class investment.' It is alleged that this was a false representation, for that it was not true that Fleck was a 'very desirable' or a 'most desirable' tenant. The vendors went into receipt of the rents in January, 1882. We have no evidence as to the receipt of rent which accrued before Lady Day, 1882, but as to the quarter's rent which accrued on that day it is in evidence that it was not paid at once; that a distress was threatened but not put in, and that the tenant paid £30 on the 6th of May, £40 on the 13th of June, and the balance of £30 some time before August, but at what precise time it does not appear. At the date of the auction, on the 4th of August, the midsummer rent had been applied for, but no part of it had been paid. Under this state of things the representation in question was made. It is said that these are words of course, put in by the auctioneer; but I hold it to be the duty of a vendor to see that the property is not untruly described, and I cannot hold him to be excused because a description which the property will not bear has been inserted by the auctioneer without his instructions. Nor can the auctioneer excuse himself for inserting a false representation by say-

ing that he did not know it to be untrue. I think that Mr. Justice Denman came to a correct conclusion as to there having been a material misrepresentation, for the vendors must have known perfectly well that the tenant did not pay his rent properly, and they, therefore, were not justified in describing him as a very desirable tenant.

We have, then, to consider whether the representation materially influenced the defendants in coming to a conclusion to bid for the property. The evidence on this head is all one way. This evidence[1] is uncontradicted. It is true that in a case of this kind it would be very difficult to find any person who could contradict the evidence, and reliance was placed on the secretary's report. I think that the expressions in this report as to Fleck, from the amount of business he was doing, being hardly able to pay the rent, only mean that, according to the amount of business at present going on, it was difficult to see how Fleck could pay his rent and taxes out of the profits, and that these expressions do not at all tend to show that he was not a desirable tenant, for he might have means which would enable him to go on paying the rent till the business improved. Then Alderman Knight states most positively that, having regard to the surroundings, he should not have purchased but for the representation that Fleck was a very desirable tenant. It must then, in my opinion, be considered that the representation was relied on. Now, a man who paid his rent so irregularly could not properly be represented as a desirable tenant.

After the report had been considered by the directors, the secretary was authorized to attend at the auction and bid up to £5000. The secretary, no doubt, saw that the biddings were going in such a way that he should have a chance of getting a better bargain by private contract. He did

[1] The evidence of Alderman Knight, that the entire board of directors of the company, of which he was chairman, trusted in the statement in the particulars that Fleck was a 'very desirable tenant,' when in fact he was at the time, but without the knowledge of the defendants, insolvent.

not bid, but immediately after the auction, the property not having been sold, he agreed to purchase for £4700. Some observations were made on a conversation alleged to have taken place between the secretary and the auctioneer, tending to show that the former knew something to Fleck's disadvantage. But the secretary, on this occasion, was an agent for another purpose; being directed to buy the property if he could get it for a sum not exceeding £5000, it was no part of his business to regulate his business by what he learned about the tenant. What he may have heard or said on that occasion, when he was only sent as an agent for the purpose of buying on the best terms he could get, not exceeding £5000, cannot be evidence against the directors.

I need not say much as to the cases. In Scott *v.* Hanson, 1 Sim. 13; 1 Russ. & M. 128, and Trower *v.* Newcome, 3 Mer. 704, the question was whether there was any misrepresentation or not. In Trower *v.* Newcome a living was described as likely to become vacant soon, and a statement was made orally that it would become vacant on the death of a person aged eighty-two. This did not amount to a representation that the incumbent's age was eighty-two. Redgrave *v.* Hurd, 20 Ch. D. 1, is in favor of the purchasers. On the facts as found in the present case, I think that Mr. Justice Denman came to a right conclusion.

Bowen, L. J. — I am of the same opinion. The action is by vendors for specific performance, and the purchasers allege that there is in the particulars a misrepresentation which disentitles the plaintiffs to specific performance. To sustain this defence the defendants must prove that there was a material misrepresentation, and that they entered into the contract on the faith of the representation.

Was there, then, a misrepresentation of a specific fact? This partly depends on the question whether, on the construction of the particulars, what they say as to Fleck is a representation of a specific fact, a question which the Court of Appeal has the same means of deciding as the judge in

the court below. Whether the purchasers relied upon it is a question of fact which the judge of the court below had better means of deciding than we have, for he saw and heard the witnesses.

In considering whether there was a misrepresentation I will first deal with the argument that the particulars only contain a statement of opinion about a tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense, then, a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best, involves, very often, a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

Now, a landlord knows the relations between himself and his tenant; other persons either do not know them at all, or do not know them equally well; and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now, are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which, prima facie, the vendors know everything, and the purchasers nothing. The vendors state that the property is let to a most desirable tenant: what does that mean? I agree that it is not a guaranty that the tenant will go on paying his rent, but it is to my mind a guaranty of a different sort, and amounts, at least, to an assertion that nothing has occurred in the relations between the landlord and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact.

Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think that it was not. On the 25th of March, a quarter's rent became due. On the 1st of May it was wholly unpaid, and a distress was threatened. The tenant wrote to ask for time. The plaintiffs replied that the rent could not be allowed to remain over Whitsuntide. The tenant paid on the 6th of May £30, on the 13th of June £40, and the remaining £30 shortly before the auction. Now, could it, at the time of the auction, be said that nothing had occurred to make Fleck an undesirable tenant? In my opinion, a tenant who had paid his last quarter's rent by driblets under pressure must be regarded as an undesirable tenant.

Treating this, then, as a misrepresentation, did it induce the purchasers to buy? It appears to me that it is in every case a question of fact whether a person is induced to buy by a particular representation. We may obtain valuable hints from reported cases, but none of the cases appear to me to impugn the proposition that the question is one of fact, to be decided on the circumstances of each particular case. A representation in the particulars must be taken as made for the purpose of influencing the purchaser's mind. Then, did the purchaser rely upon it? I cannot quite agree with the remark of the late Master of the Rolls in Redgrave *v.* Hurd, 20 Ch. D. 1, 21, that if a material representation calculated to induce a person to enter into a contract is made to him, it is an inference of law that he was induced by the representation to enter into it; and I think that probably his Lordship hardly intended to go so far as that, though there may be strong reason for drawing such an inference as an inference of fact. But here we are not left to inference. The chairman of the company[1] was called, and swore in the most distinct and positive way that it did influence him, and that but for the representation, he would not have purchased. The judge was at liberty to disbelieve him, but I see no reason why he was bound so to do. His evidence

[1] Alderman Knight.

was not shaken on cross-examination, and the judge believed him. He uses the very argument that the property had been examined on behalf of the company as strengthening the statement that the company relied on the representation, for he says the report of the secretary was so unfavorable that but for the representation as to the tenant they would not have bought. Redgrave *v.* Hurd, 20 Ch. D. 1, shows that a person who has made a misrepresentation cannot escape by saying, 'You had means of information, and if you had been careful you would not have been misled.'

It was urged that Alderman Knight would not have relied on the representation had he not put on it a construction that it will not bear; viz., that it was a guaranty that the tenant would go on paying the rent. I do not think that he understood it so. I think he merely understood it as a representation that, so far as the vendors knew, the tenant was likely to go on paying the rent for the rest of the term. If we had merely to deal with the evidence of Alderman Knight on paper, I should not feel quite satisfied that we ought to treat it as satisfactory; but as the judge who heard and saw him was satisfied, I think that we ought not to differ from his conclusions.

Fry, L. J. — After the full discussion of this case by my learned brothers I have little to add. The first question is whether the stating Fleck to be a very desirable tenant was a misrepresentation. It seems to me that the vendors by describing him as such stated in substance that they knew no fact which showed him not to be a desirable tenant. The judge in the court below has found that they did know facts which showed him not to be a desirable tenant, and I see no reason to dissent from that conclusion.

The second question is whether the purchasers purchased on the faith of that representation. The learned judge has found that they did. On that question I feel the same difficulty as Lord Justice Bowen, and on the evidence as read before us I should have felt inclined to come to the conclu-

sion that the contract was not induced by that representation; but as Mr. Justice Denman, who saw and heard Alderman Knight, was satisfied with his evidence, I cannot give my voice for reversing his decision.

The common contrast between statements of opinion or belief and statements of fact is often misleading. Both in reality are statements of fact, the only difference, so far, being that the first is an affirmation or a denial of a mental fact, — the state of the mind, — while the second is commonly an affirmation or a denial of a non-mental fact, — something external to the mind. The first may be actionable as well as the second, as the principal case well shows. See also Birdsey *v.* Butterfield, 34 Wis. 52; Torts (Students' Series), 28, 29.

The true contrast is between statements likely to govern conduct and statements not likely to govern conduct. Statements of opinion or belief, i. e., of a mental fact, may or may not be likely to govern conduct, and so may statements of fact, i. e., a non-mental fact. Statements of value, simply, are not actionable, not because they are not statements of fact, but because they are deemed not to be of a nature to govern the conduct of a man of ordinary intelligence.

Statements of intention, too, are statements of (mental) fact. Karberg's Case, 1892, 3 Ch. 1, 11, Lindley, L. J. And that, too, though they take the form of promise. Compare Kimball *v.* Ætna Ins. Co., 9 Allen, 540, 550.

BROWN *v.* LEACH.

Supreme Court of Massachusetts, September, 1871. 107 Mass. 364.

Deceit in the sale of goods is no defence to an action for the price, in the absence of warranty, if the goods were open to the buyer's inspection so that by reasonable diligence he could have ascertained the facts.

Action for the price of spokes sold by the plaintiff to the defendant. Defence (as stated in a bill of exceptions) that by the arrangement of the spokes at the time they were sold, and by false and fraudulent representations concerning them, the plaintiff deceived the defendant in regard to their quality, and that they were of no value. Verdict and judgment for the plaintiff.

The bill of exceptions stated that the defendant asked for the following instruction to the jury: 'If the jury believe that the plaintiff employed words or conduct with a design to deceive the defendant as to the quality of the spokes, and the defendant was deceived thereby, it would justify him in refusing to receive the goods upon discovering the deceit; also if they believe that the spokes were piled in the manner they were by the plaintiff or by his direction, with a view to deceive the defendant as to the quality of the spokes, and the defendant was thereby deceived, he was justified in refusing the property on discovering the fraud.' The request was granted subject to the qualification that 'if the deception was one which the defendant could not have discovered at the time by reasonable effort and care in examining the spokes, so as to constitute a latent defect not discoverable by reasonable care and examination on the part of the defendant, then it would justify him in refusing to receive the goods.'

Morton, J., for the court. — The instructions given by the presiding judge were in accordance with the adjudications in this State. If the plaintiff, by words or acts, deceived the defendant as to the quality or value of the goods sold, yet the defendant could not maintain an action of deceit if the goods were open to his observation and he could by the use of ordinary diligence and prudence ascertain their quality. He should use reasonable diligence to ascertain their quality, or protect himself by a warranty. The same principle applies when the purchaser seeks to avail himself of the deceit in defence of a suit for the price of the goods or in reduction of damages. Brown *v.* Costles, 11 Cush. 348; Gordon *v.* Parmelee, 2 Allen, 212; Veasey *v.* Doton, 3 Allen, 380; Mooney *v.* Miller, 102 Mass. 217.

Exceptions overruled.

This case is a departure from what lately has been called the 'general rule' in Massachusetts. Brady *v.* Finn, 162 Mass. 260; Holst *v.* Stewart, 161 Mass. 516. By that 'general rule' the court laid it down as matter of law, that 'if the plaintiff has full means of examining for himself, he can-

not aver that he was imposed upon by the false representation.' Shaw, C. J., in Salem Rubber Co. *v.* Adams, 23 Pick. 256, 265. But the question, as the law is now laid down in these later cases, is for the *jury*, whether the purchaser was guilty of negligence in relying upon the seller's representations.

In Brady *v.* Finn, an action for deceit in an exchange of lands, Lathrop, J., for the court, says: 'The question of most difficulty in the case arises from the fact that the misrepresentations were concerning facts the truth or falsity of which could have been ascertained by the plaintiff had she gone to the farm before taking a deed thereof. The general rule undoubtedly is, "that one bargaining with another must use reasonable diligence to discover for himself facts obvious to an ordinary observer, of which the means of knowledge are equally available to both parties;" and that, if he fails to do this, he cannot maintain an action of deceit for the misrepresentation of them. Holst *v.* Stewart, 161 Mass. 516, per Knowlton, J. In the same case, however, it was said: "But in the application of this rule the circumstances of each case should be considered to determine whether the plaintiff has been guilty of such inexcusable negligence as should preclude him, under a general rule of public policy, from having a remedy against one who has fraudulently abused his confidence." And in that case it was held, on the circumstances, that the court could not say, as matter of law, that the plaintiff was so careless in trusting the person making the representation that he should be precluded from recovering.

'In the case at bar the jury would have been warranted in finding that the farm which the plaintiff was induced to buy, though in the same town where she and the defendant lived, was in a remote part thereof, with which she was unacquainted; that she proposed on three occasions to the defendant to take her there, and he promised to take her on some subsequent day, but put her off on various pretences; that he hurried the matter to completion within forty-eight hours; and thus deprived the plaintiff of time for inquiry and examination; and that she was justified by the defendant's position in life and her long acquaintance with him in reposing confidence in his statements. The facts are certainly as strong in this case as in Holst *v.* Stewart, for departing from the general rule, and in submitting the question of the plaintiff's negligence to the jury.'

It may turn out, after a suitable number of verdicts in favor of the purchaser on this question of negligence, that the courts of Massachusetts will depart altogether from the 'general rule' of that State. The later cases open the way.

Upon the general subject, see Torts (Student's Series), 39–43.

ALLAIRE *v.* WHITNEY.

Supreme Court of New York, 1841. 1 Hill, 484. (See Whitney *v.* Allaire, 4 Denio, 554.)

The fact that the purchaser of property accepts the same after learning that the seller practised fraud upon him in the sale will not prevent the former from maintaining an action for damages against the latter for the fraud.

Error from the Superior Court of the city of New York. Allaire, defendant below, on the 9th of February, 1837, signed and sealed a memorandum stating that he had hired a water lot of Whitney, plaintiff below, for one year from the 1st of May then next, at $1000 rent, payable quarterly. This action was brought for the rent. Allaire on the trial set up that he was induced to sign the memorandum through a fraudulent representation by Whitney that the lot comprehended a certain other parcel of land, which turned out to belong to the corporation of New York.

Evidence was given tending to show the alleged fraud; also that Allaire discovered it before his term began, and yet took possession under the demise after obtaining a lease of the other parcel from the corporation of New York.

Allaire claimed the right to have what he contracted to pay that corporation for the parcel mentioned deducted from the rent, on the ground of the alleged fraud. The court below charged the jury among other things that, though they found the alleged fraud, yet if they also found that Allaire discovered it before the 1st of May, and, without offering to rescind his contract with Whitney or without modification of it in any way, obtained his contract from the corporation, and afterwards took possession under the contract with Whitney and held for the year, he thereby waived all objection on the ground of fraud, and was entitled to no deduc-

tion. To that Allaire excepted; and a verdict and judgment having been rendered in favor of Whitney, Allaire sued out a writ of error.

Cowen, J., for the court. — The court erred in the directions to the jury. We entertain no doubt that a present interest in the term passed from Whitney to Allaire for one year. Shep. Touch. 241, 267, 272; Woodf. L. & T. 162, Lond. ed. of 1804. It is entirely settled that when property is purchased on the faith of the fraudulent misrepresentation of the vendor the vendee has an election either to repudiate the contract or to take the benefit of it, and when sued for the price agreed to have deducted from it the damages which he has sustained in consequence of the fraud. Beecker *v.* Vrooman, 13 Johns. 302; Reab *v.* McAllister, 8 Wend. 116. This has never been denied. That he receives a delivery or takes possession of the property sold, after discovering the fraud, makes no difference in principle. The present case is entirely analogous. The damages sustained by the fraud were, at least, the amount of rent which Allaire was, in good faith, obliged to pay for the corporation property; and the jury should have been instructed to deduct so much on the hypothesis put to them.

It is not necessary to deny that where a vendee or a lessee takes or holds possession after he has discovered the fraud of his vendor or lessor, he shall not be allowed to rescind the contract; in other words, to say, as he always may do in the first instance, that the whole is void. Certainly the jury might well have been instructed in the present case that Allaire had made the lease good by election, — that he had waived the right to consider it a nullity. That, however, is a very different matter from a waiver of the cause of action or recoupment. When a man is drawn into a contract of sale or demise by fraud, a right of action attaches immediately, as much so as if trespass had been committed against him; and though he may affirm the transfer of interest and take the property, yet waiver is no more predicable of the

cause of action than where a man receives a delivery of goods which have been tortiously taken from him. The vendor or lessor was a wrongdoer when he committed the fraud; and no act of the injured party, short of a release or satisfaction, will bar the remedy; it may mitigate the amount of damage.

The court below seemed to treat the contract in question as executory, whereas it raised a clear interesse termini, as may be seen by the authorities already cited. Shep. Touch. 241, says, a lease for years to begin in futuro is grantable over. This shows that it is not a mere chose in action. But take it that a man fraudulently draws another into a contract to accept and pay for a chattel a month after. The vendee discovering the fraud on the next day, is it to be tolerated that he shall not have an action immediately? If he pay anything, even no more than a cent, as earnest, there would be no doubt. But actual damage is not necessary to an action. A violation of right, with a possibility of damage, forms the ground of an action.[1] This was admitted by Powell, J., in Ashby *v.* White, 2 Ld. Raym. 948, though he was against the action by an elector for refusing his vote. He puts the case of an action by the owner of an ancient market for erecting another market near his, which he concedes would form a ground of action without showing a diversion of toll. It goes, he admits, on the possibility that toll may be thus diverted. So an action lies for diverting part of a stream to which a man is entitled, though it do him no injury, on the possibility that a continuance of the diversion for twenty years might bar his right. Nelson, J., in Crooker *v.* Bragg, 10 Wend. 260, 264, 265.

In the case at bar Allaire might have been delayed and deprived of the chance of obtaining another convenient water lot for his business, perhaps any lot at all. Once establish, therefore, that in all matters of pecuniary dealings, in all matters of contract, a man has a legal right to demand

[1] But in many cases, as in deceit, the right is not violated unless damage is done.

that his neighbor shall be honest, and the consequence follows; viz., if he be drawn into a contract by fraud, this is an injury actionable per se.[1] Indeed, it would not be difficult in all such cases to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, or one comparatively vain; and time is money.[2] It would not be difficult, therefore, to satisfy the more ancient and strict rule of the Year Book, 19 H. 6, 44, pl. 92, viz., 'that there must not only be a thing done amiss, but also a damage either already fallen upon the party or else inevitable.' Waterer *v.* Freeman, Hob. 267. Fraud is a thing grievously amiss, and above all odious to the law; and fraud in a contract can hardly be conceived without being attended with damage in fact.

A right of action thus being complete on the day of the contract in question, whether it be considered as creating an interesse termini or an executory contract, there could be no waiver of it eo nomine. In Baylis *v.* Usher, 4 Moore & P. 790; 7 Bing. 153, s. c. nom. Baylis *v.* Fisher, the landlord made a formal distress, but never removed the property, leaving it in the tenant's uncontrolled use. In an action on the case for an excessive distress the defence was that no damage had accrued. Bosanquet, J., referred to and recognized the rule as laid down in Willoughby *v.* Backhouse, 4 Dowl. & R. 539; 2 Barn. & C. 821, s. c., viz., 'a right of action once vested can only be destroyed by a release under seal or by the receipt of something in satisfaction of the wrong done.[3] Therefore, the tenant does not waive his right of action for an excessive distress, though he afterwards enter into a written agreement with his landlord, respecting a sale of the effects seized.'

[1] That proposition cannot stand, however true it is that breach of contract is actionable per se. Freeman *v.* Venner, 120 Mass. 424; Temperton *v.* Russell, post, 109; Torts (Student's Series), 47, 48, 82.

[2] But not, it seems, in the sense that mere loss of time amounts to actual damage. Compare Byne *v.* Moore, 5 Taunt. 187; s. c. L. C. Torts 181; Torts (Student's Series), 270.

[3] See Bowman *v.* Teall, 23 Wend. 306.

On any view I have been able to take of this case I am of opinion that the judgment of the Superior Court must be reversed. *Judgment reversed.*

This case has received great attention from the courts. It stands upon firm ground, in so far as it is based upon the position that a term passed by the memorandum, and that Allaire found that he had to purchase land from the corporation of New York to make good what the demise from Whitney called for. But the chief value of the case is in its ruling upon the question of waiver and election.

MALACHY *v.* SOPER.

Common Pleas of England, Michaelmas Term, 1836. 3 Bing. N. C. 371.

A false and disparaging representation concerning the plaintiff's title to stock is not actionable unless it cause special damage.

Action for damages for false statements in a newspaper published by defendants, in regard to two suits in chancery against the plaintiff, to both of which the plaintiff had filed demurrers. The declaration alleged that the plaintiff was owner of shares of stock in a certain mine; that certain claimants to said shares had filed a bill in chancery disputing the plaintiff's right to the same, to which bill the plaintiff had demurred; that the defendants, well knowing the premises, and contriving, and wickedly and maliciously intending, to injure the plaintiff in his said rights, and to cause it to be suspected and believed that the said shares of the plaintiffs were of little or no value, and that the plaintiff had no right to use or work the said mine as aforesaid, and to hinder and prevent the plaintiff from selling or disposing of his said shares, and from deriving or acquiring from the said mine any more profits, emoluments, or advantages whatever, and also to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, to wit, on the 2d of January, 1836, wrongfully and unjustly did publish, and cause and procure to be published, a certain false, malicious, and unfounded

libel in a certain public newspaper, of and concerning the plaintiffs and his said shares, and the said using and working of the said mine, and of and concerning the aforesaid suits, bills, and demurrers, that is to say: 'Wheal Brothers silver mine (meaning the said mine); Tollervey *v.* Malachi (meaning the first-mentioned suit), and Hayward *v.* Malachi (meaning the second-mentioned suit); in these cases (meaning the said two suits) which arose out of disputes relating to the celebrated silver mine, Wheal Brothers, in the parish of Calstock (meaning the said mine), and which have been brought into the court of the Vice-Chancellor, the learned judge, after hearing long arguments, and a multitude of affidavits, has set aside the demurrers (meaning the said demurrers), and granted the prayer of the petition (meaning the prayer of the petition in each of the said bills as aforesaid, for an account and an injunction), and persons duly authorized have arrived on the workings' (meaning the workings of the said mine); thereby then meaning that the said several demurrers had been set aside by the said court, and that the prayer of the said petition on each of the said bills for an account and injunction had been granted by the said court, and that persons duly authorized by the said court had arrived on the workings of the said mine, and were hindering and preventing the said mine from being used and worked as it was before the committing of the grievance, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff, and others, the holders of shares in the said mine; whereas, in truth and in fact, at the time of the committing of the grievance, the said demurrers had not, nor had either of them, been set aside by the said court, nor had the prayer of the said petition, on each of the said bills, for an account and injunction been granted by the said court; and whereas, in truth and in fact, at the time of the committing of the grievance, no person or persons, duly authorized by the said court, had carried on the workings of the said mine, nor was nor were any person or persons hindering or pre-

venting the said mine from being used and worked as it had been before this committing of the said grievance, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff, and others, the holders of shares in the said mine. By means of which said several premises the plaintiff had been and was greatly injured in his said rights; and the said shares so possessed by him, and in which he was interested as aforesaid, became and were much depreciated and lessened in value, to wit, in the value of £50, on and in respect of each of such shares, and divers persons had believed, and still did believe, that the plaintiff had little or no right to the said shares, and that the said mine could not lawfully be worked or used for the benefit of the plaintiff; and the plaintiff had been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done; and the plaintiff had been otherwise hindered and prevented from gaining, acquiring, or deriving profits, emoluments, benefits, and advantages which otherwise would have arisen and accrued to him from the same; and also, by reason of the premises aforesaid, the plaintiff had been and was otherwise much damnified and injured.

A verdict having been obtained for the plaintiff on this declaration, damages £5, a rule nisi, to arrest the judgment, was obtained on the ground that there was no allegation or proof of special damage.

Tindal, C. J., for the court. — In this case a verdict having been found for the plaintiff at the trial of the cause, with £5 damages, a motion has been made to arrest the judgment on the ground that the declaration does not state any legal cause of action; and we are of opinion that this objection is well founded, and that the judgment must be arrested.

This is not an ordinary action for defamation of the per-

son, by the publication of slander, either oral or written, in which form of action no special damage need either be alleged or proved, the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons as shareowners in a certain mine, for an account and an injunction, had been granted by the Vice-Chancellor, and that persons duly authorized had arrived in the workings. The publication, therefore, is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine. And the objection taken is, that the plaintiff, in order to maintain this action, must show a special damage to have happened from the publication, and that this declaration shows none.

The first question, therefore, is, Does the law require in such an action an allegation of special damage? And, looking at the authorities, we think they all point the same way. The law is clearly laid down in Sir W. Jones, 196 (Lowe *v.* Harewood). 'Of slander of title, the plaintiff shall not maintain action unless it was re vera a damage, scil., that he was hindered in sale of his land; so there the particular damage ought to be alleged.' And in addition to the cases cited at the bar, viz., Sir John Tasburgh *v.* Day, Cro. Jac. 484, and Manning *v.* Avery, 3 Keb. 153, the case of Cane *v.* Golding, Style's Rep. 169, 176, furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz., 'His right and title thereunto is nought, and I have a better title than he.' The words were alleged to be spoken falso et malitiose, and that he was likely to sell and was injured by the words; and that by reason of speak-

ing the words he could not recover his titles. After verdict for the plaintiff, there was a motion in arrest of judgment; and Rolle, C. J., said, 'There ought to be a scandal and a particular damage set forth, and there is not here;' and upon its being moved again and argued by the judges, Rolle, C. J., held, that the action did not lie, although it was alleged that the words were spoken falso et malitiose, for 'the plaintiff ought to have a special cause; but that the verdict might supply; but the plaintiff ought also to have showed a special damage, which he hath not done, and this the verdict cannot supply. The declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;' and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the Digests and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, Has there been such a special damage alleged in this case as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (Cro. Eliz. 197, Cro. Car. 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale. R. 1, Rolle, 244. Admitting, however, that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title there must

be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, 'that the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done.' And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained.

It has been argued in support of the present action that it is not so much an action for slander of title, as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else. The bill in chancery, out of which the publication arose, is filed by Tollervey, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business or occupation or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended, affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words or writing or print; but that it rests on the nature of the action itself, namely, it is an action for special damage actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication, appears to us to make no other difference than that it is more widely and permanently disseminated, and in consequence more likely to be serious than where the slander of title is by words only, but that it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion that the action is not maintainable, and that the judgment must be arrested; and consequently it becomes unnecessary to inquire whether the innuendo laid in the declaration is more large than it ought to have been.

We therefore make the rule for arresting the jumdgent

Absolute.

See White *v.* Mellin, 1895, A. C. 154, House of Lords.

MARSH *v.* BILLINGS.

Supreme Court of Massachusetts, March, 1851. 7 Cush. 322.

Fraudulently to divert trade from the plaintiff by the use of a trade name or designation adopted by him is actionable, though the plaintiff may have no claim to the exclusive use of the name.

This was an action of trespass on the case. The declaration contained two counts, the first of which stated that the plaintiffs, on the 16th of January, 1849, and ever since, had purchased for a valuable consideration, and were possessed of, the sole and exclusive right and privilege of representing and acting for Paran Stevens, the lessee of the hotel or public-house in Boston known as the Revere House, at the station of the Boston and Worcester Railroad Company in Boston, in and about the carriage and transportation for hire of such passengers arriving at the station as should require the services and aid of hackmen and hacks authorized by Stevens to act for and represent him in this behalf, to transport them and their baggage from the station to the Revere House, and of the exclusive right of using, wearing, and placing upon their carriages and servants, stationed at said station, the name, badge, and designation of 'Revere House;' and that, to enable them to exercise their said rights and privileges beneficially, the plaintiffs had been put to great outlay and expense, and had bought and maintained two carriages at a great expense, to wit, the sum of four thousand dollars, and had hired and kept divers servants at great wages; and, at the time of the committing by the defendants of the grievances complained of, were used and accustomed to obtain and transport for hire, from the station to the Revere House, a great number of such passengers and their baggage; and by reason of the transportation of such passengers and baggage great profits and advantages had accrued, and still ought to accrue, to the plaintiffs. Yet

the defendants, well knowing the premises, but contriving and unjustly intending to injure the plaintiffs in the exercise of their said business or occupation, and to deprive them of great parts of their said profits and advantages,* without the license or consent of the plaintiffs, or of Stevens, and against the will of the plaintiffs, and of Stevens, did unlawfully, on the 16th of January, 1849, and on divers other days since that day, and before the purchase of this writ, keep and maintain, and caused to be kept and maintained, at said station a large number of carriages and servants, with the name, badge, or designation of 'Revere House' marked, placed, or worn upon them and each of them, in imitation of and as the name, badge, and designation worn and used by the plaintiffs as aforesaid, and in order to denote to such passengers that said coaches and servants were authorized by Stevens to transport them and their baggage from the station to the Revere House, and did knowingly and deceitfully represent, and cause their said servants to represent, to such passengers that said coaches and servants were authorized and placed by Stevens at the station, to transport for hire said passengers and their baggage from the station to the Revere House; by means of which a great number, to wit, five hundred, of such passengers were induced to enter the defendants' carriages with their baggage, and to desert and leave the carriages of the plaintiffs, and the plaintiffs thereby lost the profits and advantages which would otherwise have accrued to them from transporting for hire said passengers and their baggage from the station to the Revere House, and were subjected to great loss in their said business or occupation.

The second count was precisely like the first as far as the star (*) above, and then alleged that the defendants did unlawfully, on the 16th of January, 1849, and on divers other days since that day, and before the purchase of this writ, interfere, and cause their servants to interfere, with the plaintiffs, in the exercise of their said business or occupation, and in the obtaining and transportation by the plain-

tiffs of such passengers and their baggage from the station to the Revere House, insomuch that many passengers, to wit, five hundred, who were then and there about to enter the plaintiffs' carriages, were prevented from so doing, and the plaintiffs were thereby prevented from obtaining and transporting for hire such passengers and their baggage in such plenty as they would otherwise have done, and from realizing the profits and advantages which ought to have accrued to them in their said business and occupation, and were therein subjected to great loss.

At the trial before Bigelow, J., in the Court of Common Pleas, the plaintiffs, to prove their case, called as a witness Paran Stevens, the lessee of the Revere House, who testified that on the first day of May, 1849, he made a verbal agreement with the plaintiffs, by which they agreed to keep coaches at the station of the Boston and Worcester Railroad in Boston, to convey passengers arriving at the station by the 'long trains,' who might desire to go to the Revere House, and further agreed to keep good horses and coaches, and to employ first-rate drivers, to do the work of conveying passengers, to the acceptance of the passengers and of Stevens; in consideration of which he agreed to employ the plaintiffs to convey all passengers who might wish to go from the Revere House to the station, and authorized the plaintiffs to put on their coaches and on the caps of their drivers, as a badge, the words 'Revere House.' He further testified that a similar agreement had existed between him and the defendants, from the time when he first opened the Revere House, until the 1st of May, 1849, when it was terminated by him with the assent of the defendants, because the defendants did not do the work to his satisfaction; and that the defendants, under this agreement, had placed the words 'Revere House' on their coaches and on the caps of their drivers.

It further appeared in evidence that after the 1st of May, 1849, and during the times alleged in the plaintiffs' writ, the defendants continued to carry the words 'Revere House'

on their coaches and on the caps of their drivers; that their coaches and drivers, so marked, were kept at the station of the Boston and Worcester Railroad, and on the arrival of the 'long trains' their drivers were in the constant habit of calling out 'Revere House,' in loud tones, in the presence and hearing of the passengers by said trains. It also appeared that some time in July, 1849, Stevens requested one of the defendants to discontinue the use of the words 'Revere House' on their coaches and on the caps of their drivers; but that he refused so to do, saying he had a right to use them.

There was also some evidence that the defendants by their agents on one or more occasions stated to persons desiring conveyance to the Revere House, that they were the agents employed by the 'Revere House' or by Mr. Stevens, to convey passengers, and that the plaintiffs were not, or words to that effect, by means of which statements some passengers were diverted from the coaches of the plaintiffs, and induced to go in the coaches of the defendants. Upon this point, however, the evidence was contradictory. One person in the employ of the defendants, called as a witness by the plaintiffs, testified that on one occasion he induced three persons to leave the coach of the plaintiffs and go in the defendants' coach, by stating to them that his coach was the regular coach, and that they had got into the wrong coach. The plaintiffs also offered evidence that the defendants, during the time alleged in the plaintiffs' writ, carried large numbers of passengers from the station to the Revere House.

The plaintiffs, on the foregoing evidence, contended that they had an exclusive right to the use of the words 'Revere House' on their coaches and on the caps of their drivers; that these words were in the nature of trade-marks, and that their action would lie, on showing that the defendants had used these words in the manner above stated.

But the judge instructed the jury that no person had the legal right to claim the exclusive privilege of conveying passengers from the station of the Boston and Worcester

Railroad to the Revere House; that any person, who saw fit to engage in it, had a right to carry on the business, and to indicate, by suitable signs on his coaches, by badges on the caps of his drivers, and by calling at the station, in the hearing of passengers, the place to and from which he conveyed passengers; that the plaintiffs in this case could not recover damages of the defendants, merely by showing that the defendants had on their coaches, and on the caps of their drivers, the words, 'Revere House,' and that they had called out 'Revere House,' in the hearing of passengers in the station, and thereby obtaining the conveyance of passengers from the station to the Revere House. But that if, on the whole evidence before the jury, the burden of proof being on the plaintiffs, the jury were satisfied that the plaintiffs were authorized by Stevens to hold themselves out as his agents at the station, for the transportation of passengers thence to the Revere House, and the defendants knowing this, by means of false representations that they were the agents of Stevens for this purpose, or that the plaintiffs were not, induced persons to go by the coaches of the defendants, instead of going by the coaches of the plaintiffs, and that thereby passengers were actually diverted from the plaintiffs' coaches, then the plaintiffs might recover of the defendants such damages as the plaintiffs had shown they had sustained in consequence of such false representations, and the loss of passengers thereby occasioned.

The jury returned a verdict for the plaintiffs, assessing damages in the sum of seventy-five cents, and the plaintiffs excepted to the instructions of the judge.

Fletcher, J., for the court. — This is an action on the case, sounding in tort. The principle involved in the merits of the case is one of much importance, not only to persons situated as the plaintiffs are, but also to the public. But this principle is by no means novel in its character, or in its application to a case like the present. It is substantially the same principle which has been repeatedly recognized

and acted on by courts, in reference to the fraudulent use of trade-marks, and regarded as one of much importance in a mercantile community. Vast numbers, no doubt, of the strangers who are continually arriving at the stations of the various railroads in the city have a knowledge of the reputation and character of the principal hotels, and would at once trust themselves and their luggage to coachmen supposed to have the patronage and confidence of these establishments. Not only much wrong might be done to individuals situated like the plaintiffs, but great fraud and imposition might be practised upon strangers, if coachmen were permitted to hold themselves out falsely as being in the employment, or as having the patronage and countenance, of the keepers of well-known and respectable public-houses. It was said, in behalf of the defendants, that the lessee of the Revere House had no exclusive right to convey passengers from the Worcester Railroad to his house, nor had he the exclusive right to put upon his coaches or the badges of his servants the words 'Revere House,' and could confer no such exclusive right on the plaintiffs; that the defendants, in common with all other citizens, have a right to convey passengers from the Worcester Railroad to any public-house, and have a right to indicate their intention so to do, by marks on their coaches and on the badges of their servants.

This may all be very true, but it does not reach the merits of the case. The plaintiffs do not claim the exclusive right of using the words 'Revere House;' but they do claim the exclusive right to use those words in a manner to indicate, and for the purpose of indicating, the fact that they have the patronage and countenance of the lessee of that house, for the purpose of transporting passengers to and from that house, to and from the railroads. The plaintiffs may well claim that they had the exclusive right to use the words 'Revere House,' to indicate the fact that they had the patronage of that establishment; because the evidence shows that such was the fact, and that the plaintiffs, and they alone, had such patronage of that house, by a fair

and express agreement with the lessee. For this privilege they paid an equivalent in the obligations into which they entered. The defendants, no doubt, had a perfect right to carry passengers from the station to the Revere House. And they might perhaps use the words 'Revere House,' provided they did not use them under such circumstances and in such a manner as to effect a fraud upon others.

The defendants have a perfect right to carry on as active and as energetic a competition as they please, in the conveyance of passengers to the Revere House or any other house. The employment is open to them as fully and freely as to the plaintiffs. They may obtain the public patronage by the excellence of their carriages, the civility and attention of their drivers, or by their carefulness and fidelity, or any other lawful means. But they may not by falsehood and fraud violate the rights of others. The business is fully open to them, but they must not dress themselves in colors, and adopt and wear symbols which belong to others.

The ground of action against the defendants is not that they carried passengers to the Revere House, or that they had the words 'Revere House' on the coaches and on the caps of the drivers, merely; but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence, of the lessee of the Revere House, in violation of the rights of the plaintiffs. The jury would have been well warranted by the evidence in finding that the defendants used the words 'Revere House,' not for the purpose of indicating merely that they carried passengers to that house, but for the purpose of indicating, and in a manner and under circumstances calculated and designed to indicate, that they had, and to hold themselves out as having, the patronage of that establishment. Upon the evidence in the case, the jury should have been instructed, that if they were satisfied by the evidence that the plaintiffs had made the agreement with the lessee of the Revere House, as stated, they had, under and by virtue of that agreement, an exclusive right to use the words 'Revere

House,' for the purpose of indicating and holding themselves out as having the patronage of that establishment for the conveyance of passengers; and that if the defendants used those words, in the manner and under the circumstances stated in the evidence, for the purpose of falsely holding themselves out as having the patronage and confidence of that house, and in that way to induce passengers to go in the defendants' coaches, rather than in those of the plaintiffs, that would be a fraud on the plaintiffs, and a violation of their rights, for which this action would lie, without proof of actual or specific damage; that if the jury found for the plaintiffs, they would be entitled to such damages as the jury, upon the whole evidence, should be satisfied they had sustained; that the damage would not be confined to the loss of such passengers as the plaintiffs could prove had actually been diverted from their coaches to those of the defendants; but that the jury would be justified in making such inferences, as to the loss of passengers and injury sustained by the plaintiffs, as they might think were warranted by the whole evidence in the case.

Though the instructions, as given, may have been intended to conform substantially to these views, yet, upon the whole, it seems to the court that the principles of the law, upon which the rights of the parties were to be determined, were not stated with all that distinctness and accuracy which the practical importance of the case requires.

The principles of law which govern this decision are so fully settled by numerous decisions, that it seems unnecessary to go into any particular examination of authorities, but it is sufficient merely to refer to some leading cases. Coats *v.* Holbrook, 2 Sandf. Ch. 586; Blofeld *v.* Payne, 4 B. & Ad. 410; Morison *v.* Salmon, 2 Man. & Gr. 385; Knott *v.* Morgan, 2 Keen, 213; Croft *v.* Day, 7 Beavan, 84; Rodgers *v.* Nowill, 5 Man., G. & S. 109; Bell *v.* Locke, 8 Paige, 75; Stone *v.* Carlan, 13 Law Reporter, 360.

New trial ordered.

SYKES *v.* SYKES.

King's Bench of England, Michaelmas Term, 1824. 3 Barn. & C. 541.

Use by defendant of a trade name, in fraud of plaintiff to his damage, is actionable.

Case. The declaration alleged that the plaintiff, before and at the time of committing the grievances complained of, carried on the business of a shot-belt and powder-flask manufacturer, and made and sold for profit a large quantity of shot-belts, powder-flasks, &c., which he was accustomed to mark with the words 'Sykes Patent,' in order to denote that they were manufactured by him, the plaintiff, and to distinguish them from articles of the same description manufactured by other persons; that plaintiff enjoyed great reputation with the public on account of the good quality of the said articles, and made great gains by the sale of them, and that defendants, knowing the premises, and contriving, &c., did wrongfully, knowingly, and fraudulently, against the will and without the license and consent of the plaintiff, make a great quantity of shot-belts and powder-flasks, and cause them to be marked with the words 'Sykes Patent,' in imitation of the said mark so made by the plaintiff in that behalf as aforesaid, and in order to denote that the said shot-belts and powder-flasks, &c., were of the manufacture of the plaintiff, and did knowingly, wrongfully, and deceitfully sell, for their own lucre and gain, the said articles so made and marked as aforesaid, *as and for* shot-belts and powder-flasks, &c., of the manufacture of the plaintiff. Whereby plaintiff was prevented from selling a great quantity of shot-belts, powder-flasks, &c., and greatly injured in reputation; the articles so manufactured and sold by the defendants being greatly inferior to those manufactured by the plaintiff. Plea, not guilty.

At the trial before Bayley, J., at the last Yorkshire assizes, it was proved that some years before the plaintiff's father obtained a patent for the manufacture of the articles in question. In an action afterwards brought for infringing the same, the patent was held to be invalid on account of a defect in the specification; but the patentee, and afterwards the plaintiff, continued to mark the articles with the words 'Sykes Patent,' in order to distinguish them as their manufactures. The defendants afterwards commenced business, and manufactured articles of the same sort, but of an inferior description, and sold them at a reduced price to the retail dealers. They marked them with a stamp resembling as nearly as possible that used by the plaintiff, in order that the retail dealers might, and it was proved that they actually did, sell them again, as and for goods manufactured by the plaintiff; but the persons who bought these articles from the defendants, for the purpose of so reselling them, knew by whom they were manufactured. It further appeared that the plaintiff's sales had decreased since the defendants commenced this business.

It was contended for the defendants that the plaintiff could not maintain this action, for that one of the defendants being named Sykes, he had a right to mark his goods with that name, and had also as much right to add the word 'patent' as the plaintiff, the patent granted to the latter having been declared invalid. The learned judge overruled the objection, as the defendant had no right so to mark his goods *as and for* goods manufactured by the plaintiff, which is the allegation in the declaration.

It was then urged that the declaration was not supported by the evidence, for that it charged that the defendants sold the goods as and for goods made by the plaintiff; whereas the immediate purchasers knew them to be manufactured by the defendants. The learned judge overruled this objection also, and left it to the jury to say whether the defendants adopted the mark in question for the purpose of inducing the public to suppose that the articles were not manufactured

by them but by the plaintiff; and they found a verdict for the plaintiff. Motion for new trial on the ground that the facts proved did not support the declaration.

ABBOTT, C. J., for the court. — I think that the substance of the declaration was proved. It was established most clearly that the defendants marked the goods manufactured by them with the words 'Sykes Patent,' in order to denote that they were of the genuine manufacture of the plaintiff; and although they did not themselves sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers for the express purpose of being resold as goods of the plaintiff's manufacture. I think that is substantially the same thing, and that we ought not to disturb the verdict. *Rule refused.*

MALICIOUS PROSECUTION.

VANDERBILT *v.* MATHIS.

Superior Court of New York city, February, 1856. 5 Duer, 304.

To maintain an action for malicious prosecution, three facts must be established: 1. That such prosecution was determined in favor of the plaintiff before the action was commenced. 2. The want of probable cause. 3. Malice.

The plaintiff complained that the defendant had falsely, maliciously, and without any reasonable or probable cause, charged him with committing perjury in a certain case before R. E. Stilwell, a commissioner of the United States for the Southern District of New York, whereupon the plaintiff was arrested and brought before said commissioner, and upon examination acquitted.

The errors of law alleged are stated in the opinion.

Bosworth, J., for the court. — To maintain an action for malicious prosecution, three facts, if controverted,[1] must be established: 1. That the prosecution is at an end, and was determined in favor of the plaintiff. 2. The want of probable cause. 3. Malice. In such an action it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that, alone, is not prima facie evidence of the want of probable cause. Gorton *v.* De Angelis, 6 Wend. 418.

It is equally essential that the former prosecution should appear to have been maliciously instituted. Malice may be

[1] The words 'if controverted' are used here inadvertently, it seems.

inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events merely because they may find the absence of probable cause. Unless the evidence, in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of malice, other evidence, in support of it, must be given. Evidence as to the conduct of the defendant, in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication, are properly admitted to prove malice. Such evidence must be given as will justify a jury in finding the existence of malice. The rule is uniformly stated, that, to maintain an action for a former prosecution, it must be shown to have been without probable cause, and malicious. Vanduzer *v.* Linderman, 10 Johns. R. 106; Murray *v.* Long, 1 Wend. 140; 2 Stark. Ev. 494; Willans *v.* Taylor, 6 Bing. 183.

The judge, at the trial, charged that the fact that the plaintiff was discharged before the magistrate showed, prima facie, that there was no probable cause for the arrest, and shifted the burden of proof from the plaintiff to the defendant, who was bound to show affirmatively that there was probable cause. He was requested to charge 'that the discharge of Vanderbilt was not prima facie evidence of the want of probable cause.' This he refused to do. To this refusal to charge, and to the charge as made, the defendant excepted.

He also charged 'that, if probable cause is made out, the question of malice becomes immaterial, except as bearing on the question of damages.' 'This question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages.' He was requested to charge 'that the jury could not find a verdict for the plaintiff, unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe, from the evidence, that, in making the complaint, the

defendant acted from malicious motives.' This the judge declined to do, and to his refusal so to charge the defendant excepted.

Although the evidence which establishes the want of probable cause may be, and generally is, such as to justify the inference of malice, yet we understand the rule to be, that when it is a just and proper inference from all the facts and circumstances of the case, upon all the evidence given in the cause, 'that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts and circumstances disprove that which is of the essence of the action, viz., the malice of the defendant in pressing the charge.'

In Bulkeley *v.* Smith, 2 Duer, 271, the court stated the rule to be, 'that, in order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in making it. Malice is a question of fact, which, when the case turns upon it, must be decided by the jury.' Story, J., in Wiggin *v.* Coffin, 3 Story, 1, instructed the jury that two things must concur to entitle a plaintiff to recover in such an action. 'The first is, the want of probable cause for the prosecution; the second is, malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit.' In Vanduzer *v.* Linderman, 10 Johns. R. 106, the court said: 'No action lies merely for bringing a suit against a person without sufficient ground. To maintain a suit for a former prosecution, it must appear to have been without cause and malicious.'

If the charge must be understood to mean, that if the want of probable cause was established, the plaintiff was entitled to recover, although the jury should believe, from the whole evidence, that in making the complaint the defendant did not act from malicious motives, then we deem it to be erroneous. This construction is the only one of which the

language of the instruction appears to be susceptible; for the judge, in charging the jury, stated that the 'question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages.'

Malice in fact is that kind of malice which is to be proved. When malice may be and is inferred from the want of probable cause, it is actual malice which is thus proved. There is no theoretical malice which can satisfy this rule, and which can coexist with the established fact, that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice. The question of malice may be a turning-point of the controversy, in an action of this nature.

The want of probable cause may be shown, and yet upon the whole evidence in any given case it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such that a jury cannot properly doubt the honesty and purity of the motive which induced the former prosecution, and if they fully believe that it was instituted from good motives, and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict.

The charge made, and which was excepted to, must be deemed to have been made to give the jury a rule of action, in disposing of the case upon the whole evidence. We think it was not only calculated to mislead, but was erroneous.

A new trial must be granted, with costs to abide the event.

GRAVES *v.* DAWSON.

Supreme Court of Massachusetts, January, 1881. 130 Mass. 78.

Whether a nolle prosequi is or is not such a termination of a criminal proceeding as is necessary to sustain an action for a malicious prosecution, depends upon the other facts of the case.

Tort for malicious prosecution. Writ dated April 20, 1878. The declaration alleged that the defendant, maliciously and without probable cause therefor, caused a complaint to be sworn out before a trial justice of the county of Hampshire, wherein the plaintiff was charged with the crime of larceny of sundry articles alleged to be the property of the defendant, and of the value of $175; that thereupon the justice issued his warrant for the arrest of the plaintiff, which was duly served, and the plaintiff was brought into court; that the defendant, wrongfully and without probable cause, procured the justice to adjudge that there was probable cause to believe him, the plaintiff, guilty of the offence charged, and to order him to recognize, with surety in $500, for his appearance at the Superior Court to be held at Northampton on the third Monday of December, 1872; that the plaintiff being unable to furnish sureties for said recognizance, was committed by said justice to jail to await the action of the grand jury, and the said justice duly returned to said Superior Court authenticated copies of said complaint and warrant, and the doings thereon, and the same were entered on the docket of said court; that the plaintiff was detained in jail, by reason of said commitment, until December 26, 1872, when it was ordered by the justice of said Superior Court sitting at Northampton that the plaintiff be discharged; that the entry of the case on the docket of the Superior Court was continued thereon until December 24, 1873, when the district attorney entered a

nolle prosequi thereon; that the grand jury for said county found no bill against the plaintiff; and that the prosecution was wholly determined before the commencement of this action.

The defendant demurred to the declaration, assigning the following reasons therefor: '1. Because it is nowhere alleged in said declaration that the matter of complaint and charge made by the defendant against the plaintiff was made or exhibited before the grand jury for the county of Hampshire, or that the said grand jury ever considered of the matter of said complaint, or of said charge against the plaintiff. 2. Because it is nowhere averred in said declaration that the plaintiff had a trial, or was otherwise put in peril before the justice or in the Superior Court. 3. Because neither the plaintiff's discharge by the justice of the Superior Court on December 26, 1872, nor the entry of a nolle prosequi by the district attorney on December 24, 1873, fully, effectually, and finally terminated the prosecution against the plaintiff so as to entitle him to maintain this action.' The Superior Court sustained the demurrer, and entered judgment for the defendant; and the plaintiff appealed to this court.

Lord, J. We think it was error in the Superior Court to sustain the demurrer in this case. The principal ground upon which it is contended that the demurrer should be sustained is that it appears by the declaration that the prosecution claimed to have been malicious was terminated by a nolle prosequi, and that a nolle prosequi is not such a legal termination of a suit as the plaintiff is required to show in order to maintain his action of malicious prosecution. Parker *v.* Farley, 10 Cush. 279, is relied upon in support of this proposition.

That case has been so many times referred to as supporting such doctrine in its broadest form, and thus apparently conflicting with other decisions in other tribunals and within our own jurisdiction, that it is proper to examine the report of that case, and see how far it accords with or differs from

established principles. Upon an examination of that case, it appears that nothing was decided by it except that, as matter of law, the termination of a prosecution by the entry of a nolle prosequi was not necessarily such a termination of the suit as entitled a defendant to maintain an action for malicious prosecution. That question may be one of pure law, or purely of fact, or it may be a mixed question of law and fact. Parker *v.* Farley was not heard upon demurrer, nor upon exceptions. The parties, foreseeing that certain questions of law which might be decisive of the case would inevitably arise during the trial, as matter of convenience and economy, agreed to present those questions of law for the decision of the court prior to the trial of the facts before a jury, and to accomplish this, and render an investigation of the facts unnecessary, the Chief Justice of this court made a formal ruling, by consent of counsel, that the action could not be maintained, and reported the case for the decision of the full court. In order to present such questions of law, it became necessary to state all the facts in relation to the prosecution of the plaintiff, that the court might see whether there were facts necessarily conclusive in law against the right of the plaintiff to recover.

The facts thus presented were substantially these: Farley, one of the defendants, made complaint against Parker, the plaintiff, of having committed the crime of perjury. Upon this complaint an indictment was found against Parker, and upon that indictment Parker was tried and convicted of perjury before the Court of Common Pleas. During such trial, exceptions were taken by him. Those exceptions were argued before this court and overruled, so that nothing remained in that suit, so far as the record showed, except an entry of judgment. Parker thereupon by written motion and affidavit asked for a new trial of the case because of newly discovered evidence, and this motion was allowed and a new trial was granted. Subsequently Parker applied to this court to compel the district attorney to enter a nolle prosequi in the suit, because of an agree-

ment to that effect, and some time afterward the district attorney did enter a nolle prosequi, and no further proceedings were had in the case, and the prosecution was thereby terminated.

The mere presentation of these facts shows that the naked question whether, as matter of law, the entry of a nolle prosequi is or is not such a termination of a suit as authorizes the prosecuted party to maintain an action for malicious prosecution, was not raised. It is undoubtedly true that the Chief Justice was inclined to the opinion that such was the tendency of the common-law decisions; yet it is obvious that it was not necessary for him to consider that question, and it is entirely clear that he did not consider it; for he says expressly, that, if, under some circumstances, the rule be that a nolle prosequi is to be taken to be the final termination of the suit, 'we should be of opinion that it would not apply, when a nolle prosequi and discontinuance is entered by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right, or sought for as a favor, by the party prosecuted. In the present case, it appears by the record, that the plaintiff endeavored to obtain such exemption from trial by requiring the district attorney to enter a nolle prosequi.'

But the other point decided in Parker *v.* Farley was absolutely decisive of the case. A jury properly empanelled, under correct instructions in law, had found the plaintiff guilty of the crime of perjury. Upon his application the court had granted him a new trial. He never had a new trial, he did not desire a new trial, he asked to have a nolle prosequi entered, he applied to this court to compel the district attorney to enter it, and it was subsequently entered; and upon that state of facts the court held that the record showed conclusively probable cause for the prosecution, and consequently that no action could be maintained by the plaintiff. We think, therefore, as matter of law, it cannot be said that the entry of a nolle prosequi is conclusive upon the rights of a party.

The authorities upon this subject are carefully collated and arranged by the present Chief Justice of this court in Cardival *v.* Smith, 109 Mass. 158, and the result of all those authorities is, that whether a prosecution has been so terminated as to authorize the party prosecuted to commence an action for malicious prosecution is to be determined by the facts of the particular case, of which facts the entry of a nolle prosequi may be one of several, may be the only fact, may be a controlling fact, or may be an entirely unimportant one.

We have discussed this question thus far as if the proceedings in this case had been terminated by a nolle prosequi. But that entry may have been a wholly unimportant and immaterial one, or indeed an incompetent fact. The plaintiff avers that he was held for appearance before the Superior Court at the term holden on the third Monday of December, 1872, and that authenticated copies of the complaint and warrant and proceedings thereon were entered upon the docket of that court; and, though he does not state the facts chronologically in his declaration, yet he does state the fact that at such term of the court the grand jury found no bill against him, and that on the 26th day of December he was discharged from custody under such complaint by order of the Superior Court; and it has been repeatedly held that the discharge of a party because the grand jury found no bill against him is a legal end to the prosecution. See cases cited in Cardival *v.* Smith, ubi supra. The plaintiff avers in his declaration that this complaint was entered upon the docket of the Superior Court at December term, 1872, and avers further that the district attorney at the corresponding term of the court a year afterward entered a nolle prosequi. This fact may or may not be important. If, in point of fact, it shall appear that the grand jury found no bill, and by reason thereof the court ordered the discharge of the party at the same term of the court, it is difficult to understand what legitimate results would follow from the subsequent entry of a nolle prosequi, or how the rights

of a party discharged a year before that entry could be affected

It is sufficient if the plaintiff in his declaration states facts upon which, if proved, he would be entitled to a verdict. We think he has stated such facts in his declaration. Whether when he offers his proofs it shall be found that they are insufficient in law or in fact to support his allegations, is a matter into which we cannot inquire upon this demurrer. *Demurrer overruled.*

See s. c. 133 Mass. 419; Torts (Student's Series), 59.

GRAINGER *v.* HILL.

Common Pleas of England, Hilary Term, 1838. 4 Bing. N. C. 212.

In an action for abusing the process of the court, in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined, or that the process was sued out without probable cause.

The declaration stated that the plaintiff, before the time of the committing of the grievances by the defendants hereinafter mentioned, was master and proprietor of a certain smack or vessel, hereinafter mentioned; and the plaintiff, being such proprietor, and having occasion to borrow a certain sum of money to meet his needs, applied to and requested the defendants to lend and advance to him the sum of £80, which they, the defendants, agreed to do, upon having the repayment thereof secured to them by a mortgage of the said smack or vessel; and it was thereupon agreed by and between the plaintiff and defendants that a mortgage of the said vessel should be accordingly made and given; and that the sum of money so to be advanced and lent by the defendants to the plaintiff should afterwards be repaid by the plaintiff to the defendants on a certain time then agreed upon, and not yet elapsed, to wit, the

28th of September, 1837; and that in the mean time the plaintiff should retain the command of the said smack or vessel, and prosecute and make voyages therein for his own profit and advantage; and thereupon, afterwards, to wit, on the 30th of September, 1836, the defendants accordingly lent and advanced to the plaintiff, upon and in pursuance of the said agreement, and upon the security aforesaid, the said sum of £80; and the plaintiff also thereupon, in pursuance also of the said agreement, by a certain indenture then made, signed, sealed, and delivered by the defendants of the one part and the plaintiff of the other part (the indenture was here set out), mortgaged the said vessel, subject to a proviso of redemption on payment of £80, together with interest for the same in the mean time, at and after the rate of five per cent per annum, on the 28th of September, 1837, then and now next ensuing; and the plaintiff did, in and by the said indenture, covenant, promise, and agree to and with the defendants that the plaintiff should well and truly pay, or cause to be paid, to the defendants the said sum of £80, with interest for the same, after the rate aforesaid, at or on the day and time therein and hereinbefore expressed and appointed for payment of the same. That the defendants wrongfully, illegally, and maliciously contriving to injure, harass, and distress the plaintiff, and to compel the plaintiff, by and through fear and duress of imprisonment, to give up and relinquish to them certain goods and chattels of and belonging to the plaintiff, and not included in the said mortgage security, to wit, a certain register and a certain certificate of the register of the said smack or vessel, and without the possession of which the plaintiff could not go to sea or prosecute his said voyages in manner aforesaid as agreed upon by and between the plaintiff and defendants, as the defendants well knew, long before the said time so appointed as aforesaid for the payment of the said sum of £80, to wit, on, &c., called upon and requested payment of and from the plaintiff of the said sum of £80, and then threatened to arrest him for the same unless he

immediately paid to them the amount thereof. That, upon the plaintiff's refusing so to do, the defendants wrongfully and unjustly contriving and intending as aforesaid, and to imprison, harass, oppress, injure, and impoverish the plaintiff, and to cause and procure him to be arrested and imprisoned, and to prevent his making and prosecuting any voyages whatsoever in his said smack or vessel, and wholly to ruin the plaintiff thereby, well knowing that the plaintiff was wholly unprepared and unprovided with bail, heretofore, to wit, on the 26th of November, 1836, falsely and maliciously caused and procured to be sued and prosecuted out of the court of our lord the king of the bench at Westminster, for the said sum of £80, a certain writ of our lord the king called a capias (setting it out). That the defendants, contriving and intending as aforesaid, afterwards, to wit, on, &c., wrongfully, illegally, and maliciously caused and procured the said writ to be, and the same was then, marked and indorsed for bail for £95 17*s.* 6*d.*, being the sum of £80, and certain alleged costs, charges, and expenses, making together the sum of £95 17*s.* 6*d.*; and the said writ being indorsed for bail as aforesaid, the defendants afterwards and before the return thereof, to wit, on, &c., contriving and intending as aforesaid, wrongfully and maliciously caused the plaintiff to be, and he then was, arrested by his body, under and by virtue of the said writ, and was thereupon imprisoned, and kept and detained in prison for a long time, to wit, for the space of twelve hours then next following, until he, the plaintiff, not being prepared or provided with bail to the said action, by and through fear and duress of imprisonment, was forced and compelled to give up and relinquish to them the goods and chattels before mentioned, to wit, the said register and certificate of registry, and did so give up and relinquish the same; and the defendants thence hitherto wrongfully and unjustly, and against the consent and will of the plaintiff, forcibly and against law kept and detained the same from the plaintiff. By means of which said several premises, the

plaintiff being, as the defendants before and after the time of the said arrest well knew, wholly unprepared and unprovided with bail, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful business and affairs by him during that time to be performed and transacted, but especially was prevented and deterred from making and prosecuting with the said smack or vessel, divers, to wit, four several voyages with and in the said smack or vessel, to wit, from London to Caen and back again, and lost and was deprived thereby of all the benefits, profits, and advantages which would have otherwise flowed and accrued to him the plaintiff therefrom, and was by means of the premises otherwise greatly injured and damnified.

There was a count in trover for a ship's register. The defendants pleaded the general issue.

At the trial it appeared that in September, 1836, the plaintiff, by deed, mortgaged to the defendants for £80 a vessel of which he was owner as well as captain. The money was to be repaid in September, 1837; and the plaintiff was to retain the register of the vessel in order to pursue his voyages.

In November, 1836, the defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register, and for this purpose, after threatening to arrest the plaintiff unless he repaid the money lent, they made an affidavit of debt, sued out a capias indorsed for bail in the sum of £95 17*s.* 6*d.* in an action of assumpsit, and sent two sheriff's officers with the writ to the plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present, perceiving he could not be removed, one of the defendants said to the sheriff's officers, 'Don't take him away; leave the young man with him.' The officers then told the plaintiff that they had not come to take him, but to get the ship's register; but that

if he failed to deliver the register, or to find bail, they must either take him, or leave one of the officers with him. The plaintiff, being unable to procure bail, and being much alarmed, gave up the register.

The plaintiff afterwards came to an arrangement with the defendants, was discharged from the arrest, paid the costs, repaid the money borrowed on mortgage, and received from the defendants a release of the mortgage deed. No further steps were taken in the action of assumpsit. Upon this arrangement a caption fee, which had been charged and paid by the plaintiff to the sheriff's officers, was repaid by the defendants to the plaintiff. Verdict for plaintiff; motion for nonsuit, and in arrest of judgment.

TINDAL, C. J. — This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel, which, in September, 1836, he mortgaged to the defendants for the sum of £80, with a covenant for repayment in September, 1837, and under a stipulation that, in the mean time, the plaintiff should retain the command of the vessel, and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff through duress to give up the register of the vessel, without which he could not go to sea, before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a capias, indorsed to levy £95 17*s.* 6*d.*, and kept him imprisoned, until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained, by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in trover for the register. The defendants pleaded the general issue; and, after a verdict for the plaintiff, the case comes before us on a double ground, under an application for a nonsuit, and in arrest of judgment.

The first ground urged for a nonsuit is, that the facts

proved with respect to the writ of capias do not amount to an arrest. It appears to me that the arrest was sufficiently established.

. . . . . .

The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same; that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ. Here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.

As to the count in trover, if the taking of the register was wrongful, that taking was of itself a conversion, and no demand and refusal was necessary as a preliminary to this action. It seems to me that taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking, and therefore this rule must be discharged.

Park, J. — I am of the same opinion. According

to the authority in Buller's Nisi Prius this was a good arrest.

The argument as to the omission to prove the termination of the defendants' suit, and to allege want of reasonable and probable cause for it, has proceeded on a supposed analogy between the present case and an action for a malicious arrest. But this is a case primæ impressionis, in which the defendants are charged with having abused the process of the law, in order to obtain property to which they had no color of title; and, if an action on the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances. I admit the authority of the cases which have been cited, but they do not apply to the present.

As to the count in trover, the compulsion under which the register was obtained was tantamount to a conversion, and a demand and refusal was not necessary in order to support this action. In Parker *v.* Patrick, 5 T. R. 175, where the defendant had regained possession of goods of which he had been deprived by a fraud, and the plaintiff, who had given value for them without notice of the fraud, sued him in trover, and obtained a verdict, it was never objected that he should have demanded the goods in order to commence his action. So, in Wyatt *v.* Blades, 3 Campb. 396, the act of bankruptcy was committed the 8th of December; the goods were seized on the 8th of February following, and carried to a broker's; on the 12th of the same month the commission issued; and notice was afterwards served upon the sheriff not to sell the goods, as they belonged to the assignees. In consequence, the goods were never sold, but still remained at the broker's, and no demand of them was ever made. But Lord Ellenborough said: 'Had the goods not been removed, it would have been difficult to say there was any conversion; but I think the removal of them after the act of bankruptcy is a sufficient conversion to maintain the action, notwithstanding the subsequent notice.' That is a strong case to show that, where the circumstances

attending the taking are tantamount to an actual conversion, a demand is not necessary to support an action of trover.

VAUGHAN, J. — I think that in law this was clearly an arrest. If the party is under restraint, and the officer manifests an intention to make a caption, it is not necessary there should be actual contact. With respect to the termination of the defendants' suit, all the facts in the declaration were proved. The termination of that suit is not alleged, nor was it necessary, because what the plaintiff complains of is an abuse of the process of law, for the purpose of extorting property to which the defendants had no claim; that abuse having been perpetrated, and the defendants having attained their end by it, it is immaterial whether their suit was terminated or not. The case is altogether distinct from cases of malicious prosecution or arrest, in which it is always the course to allege and prove that the former proceeding is at an end.

So, with respect to the argument in arrest of judgment, this case stands on its own peculiar circumstances. It is an action for abusing the process of law, by employing it to extort property to which the defendants had no right; that is of itself a sufficient cause of action, without alleging that there was no reasonable or probable cause for the suit itself.

With respect to the count in trover, if there be a tortious taking, no previous demand is necessary to support the plaintiff's action. Whether such taking be by force or fraud makes little or no difference in the right to maintain the action; but this taking was as much a forcible taking as if a pistol had been presented at the plaintiff's head.

BOSANQUET, J. — I thought at the trial, and am still of the same opinion, that these circumstances amounted to an arrest. The plaintiff resigned his personal liberty under the authority of the writ, and actual contact was not necessary to complete the arrest.

Then, as the record stands, it was not necessary to prove, and, I think, under the circumstances of this case, it was not necessary either to allege or prove, the termination of the defendant's suit. This is not an action for a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done. The process was enforced for an ulterior purpose, — to obtain property by duress, to which the defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the court. And that distinction is an answer as well to the argument in arrest of judgment as to the argument in support of a nonsuit.

As to the count in trover, if the register was obtained by duress of imprisonment, a demand and refusal were not necessary to establish a conversion. And as it is clear that the register was illegally obtained by duress, under an abuse of the process of this court, this rule must be

Discharged.

CONSPIRACY.

HUTCHINS *v.* HUTCHINS.

Supreme Court of New York, January, 1845. 7 Hill, 104.

An action for conspiracy by misrepresentation cannot be maintained without proof of damage.

This was an action for an alleged conspiracy by the defendants, whereby they had induced the plaintiff's father to revoke a will, in which certain real estate was devised to the plaintiff. The declaration alleged that the defendants, by fraudulently, maliciously, and wrongfully combining, confederating, and conspiring together, and by fraud, deceit, and misrepresentation, had induced the father of the plaintiff to revoke the said will.

Demurrer to the declaration.

Nelson, C. J., for the court. — The allegation of a conspiracy between the defendants, for the purpose and with the intent of committing the wrong complained of in the several counts of the declaration, is of no importance, so far as respects the cause and ground of the action. A simple conspiracy, however atrocious, unless it resulted in actual damage to the party, never was the subject of a civil action; not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use. Then, indeed, the allegation of a conspiracy was material and substantive, because, unless established by the proof, the plaintiff failed, as it was essential that the verdict should be against two at least in order to be upheld.

The writ of conspiracy, technically speaking, did not lie at common law in any case, except where the conspiracy was

to indict the party either of treason or felony, by which his life was in danger, and he had been acquitted of the indictment by verdict. All the other cases of conspiracy in the books were but actions on the case; and though it was usual to charge the conspiracy in the declaration, the averment was immaterial, and need not be proved. The action could always be brought against one defendant; or if brought against more, one might be found guilty and the rest acquitted. Saville *v.* Roberts, 1 Ld. Raym. 374; s. c. 12 Mod. 208; 1 Salk. 13; Skinner *v.* Gunton, 1 Saund. 228; ib. 230, note (4), and the cases there cited; Jones *v.* Baker, 7 Cowen, 445.

Where the action is brought against two or more as concerned in the wrong done, it is necessary, in order to recover against all of them, to prove a combination or joint act of all. For this purpose it may be important to establish the allegation of a conspiracy. But if it turn out on the trial that only one was concerned, the plaintiff may still recover, the same as if such one had been sued alone. The conspiracy or combination is nothing so far as sustaining the action goes, the foundation of it being the actual damage done to the party. In Saville *v.* Roberts, 1 Ld. Raym. 378, Holt, C. J., said: 'An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie. From whence it follows that the damage is the ground of the action, which is as great, in the present case, as if there had been a conspiracy.' That was an action against one only, for maliciously procuring the plaintiff to be indicted of a riot, by reason whereof he was subjected to costs and expense in defending himself.

We may therefore lay out of consideration altogether the conspiracy charged against these defendants, in endeavoring to ascertain if any foundation is laid for the action, and regard it the same as if the defendant Hutchins had alone committed the several grievances for which redress is sought. The case would then be substantially this: The

father of the plaintiff devised to him, in due form of law, a farm consisting of one hundred and fifty-one acres of land. The defendant, being aware of the fact, and intending to deprive the plaintiff of the benefit and advantage of the devise, and of his expected estate and interest in the farm, falsely and maliciously represented to the father, that, after his decease, the plaintiff intended to set up a large demand against the estate, which would absorb the greater part of it, and thus deprive the other children of their just share; at the same time defaming and calumniating the character of the plaintiff in several particulars. By these fraudulent means the defendant prevailed upon the father to revoke and cancel the will, and to make and execute a new one, by which the plaintiff was excluded from all participation in his father's estate.

This is the substance of the case in its strongest aspect, as presented by the pleadings; and the question arises whether any actual damage, in contemplation of law, is shown to have been sustained by the plaintiff.

Fraud without damage, or damage without fraud, gives no cause of action, but, where both concur, an action lies. Damage, in the sense of the law, may arise out of injuries to the person or to the property; as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect. Thus, for injuries to his health, liberty, and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie.

Now, testing the plaintiff's declaration by these principles, has he made out a case from which it can be said that damage has resulted to him? I think not. In respect to the

farm devised to him by the first will, he fails to show that he had any such interest in it as the law will recognize. The only foundation of his claim rests upon the mere unexecuted intention of his father to make a gift of the property; and this cannot be said to have conferred a right of any kind. To hold otherwise, and sanction the doctrine contended for by the plaintiff, would be next to saying that every voluntary courtesy was matter of legal obligation; that private thoughts and intentions, concerning benevolent or charitable distributions of property, might be seized upon as the foundation of a right which the law would deal with and protect.

I have not overlooked the causes referred to on the argument, of actions of slander, where special damage must be shown in order to make the words actionable, and where the deprivation of any present substantial advantage, even though gratuitous, such as the loss of customers, of a permanent home at a friend's, or advancement in life, and such like, if the immediate and direct consequence of the words, will sustain the action. 1 Starkie on Slander, 158–186, ed. of 1843. If this description of special damage is to be regarded as the gist and foundation of the action, I rather think the principle should be regarded as peculiar to that special injury. I am not aware of any class of remedies given for a violation of the rights of property, where so remote and contingent a damage has been allowed as a substantial ground of action.

But the law applicable to the case referred to proceeds upon the ground that the plaintiff, by the wrongful act complained of, has been deprived of the present actual enjoyment of some pecuniary advantages. No such damage can be pretended here. At best, the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the plaintiff; or the testator might change his mind or lose his property.

In short, the plaintiff had no interest in the property of which he says he has been deprived by the fraudulent inter-

ference of the defendant, beyond a mere naked possibility, an interest which might, indeed, influence his hopes and expectations, but which is altogether too shadowy and evanescent to be dealt with by courts of law.

I am of opinion that the defendant is entitled to judgment.

Ordered accordingly.

MOGUL STEAMSHIP COMPANY *v.* McGREGOR.

House of Lords, 1892. A. C. 25.

A combination between traders to control a certain trade, entered into for the sole purpose of benefiting themselves, is not unlawful, though followed by damage to others.

Appeal from a decision of the Court of Appeal. 23 Q. B. D. 598. The action was brought by the appellants, the Mogul Steamship Company, Limited, against the respondents, McGregor, Gow & Co., T. Skinner & Co., and others. The statement of claim[1] alleged as follows: —

1. The plaintiffs have suffered damage by reason of the defendants (other than Sutherland, Barnes, Holt, and Swire), as and being owners of numerous steamers trading between ports in the Yangtse-Kiang River and London, and the defendants Sutherland, Barnes, Holt, and Swire, as and being interested in the steamers owned by the defendants, the Peninsular and Oriental Steam Navigation Company and the Ocean Steamship Company, conspiring together and with other persons at present unknown to the plaintiffs to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs from shippers to be carried from ports in the said river to London, for reward to the plaintiffs in that behalf.

2. The conspiracy consisted and consists of a combination and agreement by and amongst the defendants (other

[1] This, under the Judicature Acts, has taken the place of the common law declaration.

than Sutherland, Barnes, Holt, and Swire) as and being owners of steamers trading as aforesaid and having by reason of such combination and agreement control of the homeward shipping trade, and the defendants Sutherland, Barnes, Holt, and Swire, as and being interested in the steamers owned as aforesaid, pursuant to which, shippers were and are bribed, coerced, and induced to agree to forbear from shipping cargoes by the steamers of the plaintiffs.

3. In the alternative the conspiracy consisted and consists of a combination and agreement by and amongst the defendants, as and being owners of and interested in steamers as aforesaid, pursuant to which the defendants, with the intent to injure the plaintiffs and prevent them from obtaining cargoes for their steamers trading between the said ports, agreed to refuse and refused to accept cargoes from shippers except upon the terms that the said shippers should not ship any cargoes by the steamers of the plaintiffs, and by threats of stopping the shipment of homeward cargoes altogether, which threats they had the power and intended to carry into effect, did and do prevent shippers from shipping cargoes by the plaintiffs' steamers, and threaten and intend to continue so to do.

The plaintiffs claimed damages and an injunction to restrain the defendants from continuing the said wrongful acts. An application for an interim injunction was refused by Lord Coleridge, C. J., and Fry, L. J., 15 Q. B. D. 476. The following are the material facts proved at the trial of the action before Lord Coleridge, C. J., without a jury, 21 Q. B. D. 544: —

The appellant company was incorporated in 1883, and took over the steamers owned by Gellatly & Co., and among them the SS. Pathan, Afghan, and Ghazee, which were in China in the tea seasons of 1884 and 1885. Gellatly & Co. were the principal owners in and managers of the appellant company, and were also the London outward loading brokers of the Ocean Steamship Company. The respondents were owners of, or managing owners interested in, steamers

engaged in the trade between China and England and elsewhere.

The 'tea season' in China lasts about five to six weeks, beginning from the latter part of May. Tea exported during the season from Hankow for England is either shipped there (600 miles up the river Yangtse) direct for England or sent to Shanghai (at the mouth of the river) and there reshipped. The defendants desired to secure this trade for themselves and to maintain freights at remunerative rates. With this object they had in some previous years agreed among themselves to regulate the amount of tonnage to be sent up to Hankow and the freights to be demanded. In the spring of 1884 they held a conference, as the result of which they issued to merchants and shippers in China the following circular: —

'SHANGHAI, 10th May, 1884.

'To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. & O. S. N. Co.'s, M. M. Co.'s, O. S. N. Co.'s Glen, Castle, Shire, and Ben lines and to the SS. Oopack and Ningchow, we shall be happy to allow a rebate of 5 per cent. in the freights charged.

'Exporters claiming the returns will be required to sign a declaration that they have not made or been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by other than the said lines. Shipments by the SS. Albany, Pathan, and Ghazee on their present voyages from Hankow will not prejudice claims for returns. Each line to be responsible for its own returns only, which will be payable half yearly commencing the 30th of October next. Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even although its other branches may have given entire support to the above lines.

'The foregoing agreement on our part to be in force from present date till the 30th of April, 1886.'

The plaintiffs (who were not members of the conference) were admitted to the benefits of the arrangement in respect

of their vessels, the Pathan and Ghazee, for the homeward voyage of that season only.

In 1885 the defendants held another conference and came to a written agreement, dated the 7th of April, which regulated as between the defendants the tea trade with China and Japan, and provided for a certain division of cargoes, for the determination of the rates of freight and for the continuance of the rebate of 5 per cent. It also provided that if 'outsiders' should start for Hankow, Conference steamers must meet them there, the selection of tonnage to be employed for this purpose being left to the Shanghai agents of the lines in consultation together, the number to be limited as much as consistent with effective opposition. That should there not be a Conference steamer in port or named for despatch within a week with available cargo space, shipments made by an outsider during that period should not invalidate the claim for the rebate of 5 per cent. on the freights. That agents of Conference steamers in China and Japan should be prohibited from being interested directly or indirectly in opposing steamers, or in the loading of sailing vessels of outsiders. And that the agreement might be terminated at any time on notice being given by the party wishing to retire to each of the others, but only by principals at home and not by agents abroad. Copies of this agreement were sent by the defendants to their agents at Shanghai. The plaintiffs desired to join this conference, but were excluded from it and from all its benefits, and in May, 1885, sent the Pathan and Afghan to Hankow to endeavor to secure homeward cargoes. The defendants' agents at Shanghai thereupon sent to shippers at Hankow the following circular: —

'SHANGHAI, 11th May, 1885.

'Private. Referring to our circular dated the 10th of May, 1884, we beg to remind you that shipments for London by the SS. Pathan, Afghan, and Aberdeen, or by other non-Conference steamers at any of the ports in China or at Hong Kong, will exclude the firm making such shipments from participation in the return during

the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the Conference lines.'

The defendants also despatched some Conference steamers to Hankow to oppose the Pathan and Afghan and secure the freights, if possible, to the exclusion of non-Conference vessels, and with this object they underbid the plaintiffs and caused a general reduction of freights at Hankow. In the result the Pathan and Afghan obtained freights, but at very low and unremunerative rates. A letter of the 1st of May was put in from the chairman of the P. & O. Co. to their agent at Shanghai to the effect that if a firm of agents at Hankow (who acted there both for that company and for the plaintiffs) should carry out their intention of loading the plaintiffs' vessels home, the P. & O. Co. would have to close their relations with them. On the 28th of May, Gellatly & Co. were dismissed from the agency of the Ocean Steamship Company.

The action was brought on the 29th of May, 1885. It was agreed that the damages should, if necessary, be ascertained by a reference. Lord Coleridge, C. J., made an order entering judgment for the defendants with costs. 21 Q. B. D. 544. That order was affirmed by the Court of Appeal (Bowen and Fry, L. JJ.; Lord Esher, M. R., dissenting) 23 Q. B. D. 598.

Lord Halsbury, L. C. — My Lords, notwithstanding the elaborate examination which this case has undergone, both as to fact and law, I believe the facts may be very summarily stated, and when so stated the law seems to me not open to doubt.

An associated body of traders endeavor to get the whole of a limited trade into their own hands by offering exceptional and very favorable terms to customers who will deal exclusively with them; so favorable that but for the object of keeping the trade to themselves they would not give such terms; and if their trading were confined to one particular

period, they would be trading at a loss, but in the belief that by such competitions they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves.

I do not think that I have omitted a single fact upon which the appellants rely to show that this course of dealing is unlawful and constitutes an indictable conspiracy.

Now it is not denied and cannot be even argued that prima facie a trader in a free country in all matters 'not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice.' This is the language of Baron Alderson in delivering the judgment of the Exchequer Chamber,[1] and no authority, indeed, no argument, has been directed to qualify that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a 'matter contrary to law.'

Now, after a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful, it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful.

There are doubtless, to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyzes what is the real meaning of such phrases, it is manifest that all that is intended to be implied by them is that any rival trading which shall be started against the association will be rendered unprofitable by the more favorable terms; that is to say, the reduced freights, discounts, and the like, which will be given to customers who will exclusively trade with the associated body. And upon a review of the facts it is impossible to suggest any malicious inten-

[1] Hilton *v.* Eckersley, 6 El. & B. at pp. 74, 75.

tion to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself. If such an injury, and the motive of its infliction, is examined and tested, upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and, consequently, unlawful, a sufficient reductio ad absurdum to dispose of that head of suggested unlawfulness.

The learned counsel, who argued the case for the appellants with their usual force and ability, were pressed from time to time by some of your lordships to point out what act of unlawful obstruction, violence, molestation, or interference was proved against the associated body of traders, and, as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful.

The sending up of ships to Hankow, which in itself and to the knowledge of the associated traders would be unprofitable, but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition, is the one fact which appears to be pointed to as out of the ordinary course of trade. My Lords, after all, what can be meant by 'out of the ordinary course of trade'? I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

I entirely adopt and make my own what was said by Lord Justice Bowen in the court below: 'All commercial men with capital are acquainted with the ordinary expedient of

sowing, one year, a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary normal standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go, and no further."'

Excluding all I have excluded upon my view of the facts, it is very difficult, indeed, to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will, and nothing has been done except in rival trading which can be supposed to interfere with the appellants' interests.

I think this question is the first to be determined: What injury, if any, has been done? What legal right has been interfered with? Because if no legal right has been interfered with and no legal injury inflicted, it is vain to say that the thing might have been done by an individual but cannot be done by a combination of persons. My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism[1] (if its meaning was rightly interpreted, which I very much doubt) on the observations made by my noble and learned friend Lord Bramwell in Regina *v.* Doruitt,[2] if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanor, and I cannot think the Chief Justice meant to throw any doubt upon such a proposition.

But in this case the thing done, the trading by a number

[1] 21 Q. B. D. 551. [2] 10 Cox, C. C. 592.

of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit and apart from partnership or sharing profits with others, but, nevertheless, avails himself of combined action, would be open to the same objections. The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors (if they might be supposed to have knowledge of the transaction) would be acting in combination for the general result, and would, whether for the benefit of the individual or for an associated body of traders, make it not the less combined action than if the combination were to share profits with independent traders; and if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defence that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination.

A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word 'unlawful' is not uncommonly, though, I think, somewhat inaccurately, used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy, as, for example, in restraint of trade; and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word 'unlawful,' which would bring the contract within the qualification which I have quoted from the judg-

ment of the Exchequer Chamber, namely, *as contrary to law*, is not applicable to such contracts.

It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. A judge in very early times expressed great indignation at such a contract;[1] and Mr. Justice Crompton undoubtedly did say (in a case where such an observation was wholly unnecessary to the decision, and therefore manifestly obiter) that the parties to a contract in restraint of trade would be indictable.[2] I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle.

In the result I think that no case whatever is made out of a conspiracy such as the appellants here undertook to establish; and it is not unimportant, for the reasons I have given, to see what is the conspiracy alleged in the statement of claim. The first paragraph alleges the conspiracy to be 'to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs.' The word 'prevent' is sufficiently wide to comprehend both lawful means and unlawful; but, as I have already said, in proof there is nothing but the competition with which I have dealt.

The second paragraph alleges that in pursuance of the conspiracy people were 'bribed, coerced, and induced to agree to forbear and to forbear from shipping cargoes by the steamers of the plaintiffs.' If the word 'bribed' is satisfied by the offering lower freights and larger discounts, then that is proved; but then the word 'bribed' is robbed of any legal significance. 'Coerced' is not justified by any evidence in the case, and the word 'induced' is absolutely neutral, and no unlawful inducement is proved.

The third paragraph uses language such as 'intention to

[1] Qu. Rex *v.* Starling, 1 Keb. 650?

[2] Hilton *v.* Eckersley, 6 El. & B. 47, 53.

injure the plaintiffs,' 'threats of stopping the shipment of homeward cargoes,' and the like. But I ask myself whether if the indictment had set out the facts without using the ambiguous language to which I have referred, in the statement of claim, it would have disclosed an indictable offence? I am very clearly of opinion it would not.

I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade is unlawful, and I am clearly of opinion that it is not.

I think, therefore, that the appeal ought to be dismissed with costs, and I so move your lordships.

Lord Watson.— . . . As the law is now settled I apprehend that, in order to substantiate their claim, the appellants must show, either that the object of the agreement was unlawful or that illegal methods were resorted to in its prosecution. If neither the end contemplated by the agreement, nor the means used for its attainment, were contrary to law, the loss suffered by the appellants was damnum sine injuria.

The agreement of which the appellants complain left the contracting parties free to recede from it at their pleasure, and is not obnoxious to the rule of public policy, which was recognized in Hilton *v.* Eckersley.[1] The decision in that case, which was the result of judicial decisions not altogether reconcilable, appears to me to carry the rule no farther than this, — that an agreement by traders to combine for a lawful purpose, and for a specified time, is not binding upon any of the parties to it if he chooses to withdraw, and consequently, cannot be enforced in invitum. In my opinion it is not an authority for the proposition that an outsider can plead the illegality of such a contract, whilst the parties

[1] 6 El. & B. 47.

are willing to act and continue to act upon it. I venture to think that the decision of this appeal depends upon more tangible considerations than any which could be derived from the study of what is generally known as public policy.

There is nothing in the evidence to suggest that the parties to the agreement had any other objection in view than that of defending their carrying-trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants, great and small, in every branch of commerce; and it is, in the eye of the law, perfectly legitimate. If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your lordships. But no such case is presented by the facts disclosed in this appeal.

The object of the combination being legal, was any illegal act committed by the respondents in giving effect to it? The appellants invited your lordships to answer that question in the affirmative, on the ground that the respondents' competition was unfair, by which they, no doubt, meant that it was tainted by illegality. The facts which they mainly relied on were these: that the respondents allowed a discount of 5 per cent. upon their freight accounts for the year to all customers who shipped no tea to Europe except by their vessels; that, whenever the appellants sent a ship to load tea at Hankow, the respondents sent one or more of their ocean steamers to underbid her, so that neither vessel could obtain cargo on remunerative terms; and, lastly, that the respondents took away the agency of their vessels from persons who also acted as shipping agents for the appellants and other trade competitors outside the combination.

I cannot for a moment suppose that it is the proper func-

tion of English courts of law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages. Until that becomes the law of the land it is, in my opinion, idle to suggest that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment. The withdrawal of agency at first appeared to me to be a matter attended with difficulty; but, on consideration, I am satisfied that it cannot be regarded as an illegal act. In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage.

My Lords, in this case it has not been proved, and it has not been suggested, that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination. The only means by which they endeavored to obtain shipments for their vessels, to the exclusion of others, was the inducement of cheaper rates of freight than the appellants were willing to accept. I entertain no doubt that the judgment appealed from ought to be affirmed. . . .

Lord Bramwell. — My Lords, the plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act the ultimate object of which was to injure the plaintiffs having its origin in malice or ill-will to them. These plaintiffs admit that materially and morally they have been at liberty to do their best for themselves without any impediment by the defendants. But they

say that the defendants have entered into an agreement in restraint of trade; an agreement, therefore, unlawful; an agreement, therefore, indictable, punishable; that the defendants have acted in conformity with that unlawful agreement, and thereby caused damage to the plaintiffs in respect of which they are entitled to bring, and bring, this action.

. . . . . .

The plaintiffs also say that these things, or some of them, if done by an individual would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons that it is strange that that should be unlawful if done by several, which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed, two; one is, that a man may encounter the acts of a single person, yet not be matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes — de minimis non curat lex; while if done by several it is sufficiently important to be treated as a crime. Let it be then that it is no answer to the plaintiffs' complaint that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several.

The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal. 'Public policy,' said Borough, J. (I believe quoting Hobart, C. J.), 'is an unruly horse, and dangerous to ride.' [1]

[1] Richardson *v.* Mellish, 2 Bing. at p. 252.

I quote also another distinguished judge, more modern, Cave, J.: 'Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.'[1] I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. How can the judge do that without any evidence as to its effect and consequences? If the shipping in this case was sufficient for the trade, a further supply would have been a waste. There are some people who think that the public is not concerned with this, — people who would make a second railway by the side of one existing, saying, 'only the two companies will suffer,' as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference did not prevent waste and was not good for the public. Lord Coleridge thought it was — see his judgment.

As to the suggestion that the Chinese profited by the lowering of freights, I cannot say it was not so. There may have been a monopoly or other cause to give them a benefit; but, as a rule, it is clear that the expense of transit, and all other expenses, borne by an exported article *that has a market price*, are borne by the importer, therefore, ultimately, by the consumer. So that low freights benefit him. To go on with the case, take it that the defendants had bound themselves to each other; I think they had, though they might withdraw. Let it be that each member had tied his hands; let it be that that was in restraint of trade; I think upon the authority of Hilton *v.* Eckersley, and other cases, we should hold that the agreement was illegal, that is, not enforceable by law. I will assume, then, that it was, though

[1] 1891, 1 Q. B. 595.

I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground they must make out that it was an offence, a crime, a misdemeanor. I am clearly of opinion it was not. Save the opinion of Crompton, J. (entitled to the greatest respect, but not assented to by Lord Campbell or the Exchequer Chamber), there is no authority for it in the English law.

It is quite certain that an agreement may be void, yet the parties to it not punishable. Take the case I put during the argument: a man and woman agree to live together as man and wife, without marrying. The agreement is illegal, and could not be enforced, but, clearly, the parties to it would not be indictable. It ought to be enough to say that the fact that there is no case where there has been a conviction for such an offence as is alleged against the defendants is conclusive.

It is to be remembered that it is for the plaintiffs to make out the case that the defendants have committed an indictable offence, not for the defendants to disprove it. There needs no argument to prove the negative. There are some observations to be made. It is admitted that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of 'fair competition'? What is unfair that is neither forcible nor fraudulent? It does seem strange that, to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection.

There is one thing that is to me decisive. I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law; perhaps not enforceable inter se, but not indictable. The Legislature has now so declared. The enactment is express, that agreements among workmen shall be binding, whether they would or would not, but for the Acts, have been deemed unlawful as in restraint of trade. Is it supposable that it would have

done so in the way it has, had the workmen's combination been a punishable misdemeanor? Impossible. This seems to me conclusive that though agreements which fetter the freedom of action in the parties to it may not be enforceable, they are not indictable. See also the judgment of Fry, L. J., on this point. Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops, sufficient for the wants of the neighborhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offence? Remember, the conspiracy is the offence, and they have conspired.[1] If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might show that from his skill he would have beaten one or both of the others. See in this case the judgment of Lord Esher, that the plaintiffs might recover for 'damages at large for future years.' Would a shipowner who had intended to send his ship to Shanghai, but desisted, owing to the defendants' agreement, and on being told by them they would deal with him as they had with the plaintiffs, be entitled to maintain an action against the defendants? Why not? If yes, why not every shipowner who could say he had a ship fit for the trade, but was deterred from using it?

The Master of the Rolls[2] cites Sir William Erle, that 'a combination to violate a private right in which the public has a sufficient interest is a crime, such violation being an actionable wrong.' True, Sir William Erle means that where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. But in this case I hold that there is no

[1] This seems to be using the word 'conspiracy' in a sense different from the ordinary. It is generally considered to mean a combination to do an unlawful thing or a lawful thing in an unlawful way.

[2] Lord Esher, dissenting in the Court of Appeal.

private right violated. His lordship further says: 'If one goes beyond the exercise of the course of trade, and does an act beyond what is the course of trade, in order — that is to say, with intent — to molest the other's free course of trade, he is not exercising his own freedom of a course of trade, he is not acting in but beyond the course of trade, and then it follows that his act is an unlawful obstruction of the other's right to a free course of trade, and if such obstruction causes damage to the other he is entitled to maintain an action for the wrong.'[1] I may be permitted to say that this is not very plain. I think it means that it is not in the course of trade for one trader to do acts the motive of which is to damage the trade of another. Whether I should agree depends on the meaning to be put on 'course of trade' and 'molest.' But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites Sir William Erle in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here. The Master of the Rolls says the lowering of the freight far beyond a lowering for any purpose of trade was not an act done in the exercise of their free right of trade, but for the purpose of interfering with the plaintiffs' right to a free course of trade; therefore a wrongful act as against the plaintiffs' right; and as injury to the plaintiffs followed, they had a right of action. I cannot agree. If there were two shopkeepers in a village and one sold an article at cost price, not for profit therefore but to attract customers or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I cannot think that the defendants did more than they had a legal right to do. I adopt the vigorous language and opinion of Fry, L. J.: 'To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts.'[2] It is a strong thing for the plaintiffs to

[1] 23 Q. B. D. 607. [2] 23 Q. B. D. 625, 626.

complain of the very practices they wished to share in, and once did.

I am of opinion that the judgment should be affirmed.

Lord Hannen. — . . . I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself.

I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves.

It only remains for me to refer to the argument that an act which might be lawful for one to do becomes criminal, or the subject of a civil action by any one injured by it, if done by several combining together. On this point I think the law is accurately stated by Sir William Erle in his treatise on the law relating to Trades Unions. The principle he lays down is equally applicable to combinations other than those of Trades Unions. He says (page 23): 'As to combination, each person has a right to choose whether he will labor or not, and also to choose the terms on which he will consent to labor, if labor be his choice. The power of choice in respect of labor and terms which one person may exercise and declare singly, many, after consultation, may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms; but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination.'

In considering the question, however, of what was the motive of the combination, whether it was for the purpose

of injuring others or merely in order to benefit those combining, the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that, in the present case, there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer.

For these reasons I think that the judgment of the Court of Appeal should be affirmed.

[The other judges agreeing, some in opinions at length],

Appeal dismissed with costs.

The following American cases were referred to by counsel for the plaintiffs: Stanton *v.* Allen, 5 Denio, 434; State *v.* Glidden, cited in State *v.* Stewart, 59 Am. Rep. at pp. 721, 724; Morris Run Coal Co. *v.* Barclay Coal Co. 68 Penn. St. 173, 186; Hooker *v.* Vandewater, 4 Denio, 349; Salt Co. *v.* Guthrie, 35 Ohio St. 666, 672; People *v.* North River Sugar Refining Co. 54 Hun, 354.

In the Court of Appeal, Bowen, L. J., said upon the subject of malice (23 Q. B. D. 612–615): 'We are invited by the plaintiffs' counsel to accept the position from which their argument started, — that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide.

'An intent to "injure" in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel, still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of

trade. For the purpose of clearness I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

'The English law, which in its earliest stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or in the language of the civil law, the animus vicino nocendi, may enter into or affect the conception of a personal wrong. See Chasemore *v.* Richards.[1] All personal wrong means the infringement of some personal right. "It is essential to an action in Tort," say the Privy Council in Rogers *v.* Rajendro Dutt,[2] "that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests is not enough."

'What then were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong (see Bromage *v.* Prosser;[3] Capital & County Bank *v.* Henty, per Lord Blackburn).[4] The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse, the defendants on their side assert to be found in their positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

'What then are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. . . . No man whether a trader or not can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. . . . But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when

[1] 7 H. L. Cas. 349, at p. 388.
[2] 13 Moore, P. C. 209.
[3] 4 B. & C. 247.
[4] 7 App. Cas. 741, at p. 772.

there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of just cause or excuse acts done in the course of trade, which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. . . .'

MALICIOUS INTERFERENCE WITH CONTRACT.

WALKER *v.* CRONIN.

Supreme Court of Massachusetts, October, 1871. 107 Mass. 555.

An action lies for damage caused by maliciously enticing shoemakers to break their contract with their employer, and for so inducing others not to contract with the same person, to his damage.

Demurrer to three counts of a declaration, the substance of which appears in the opinion of the court.

Wells, J., for the court. — The declaration, in its first count, alleges that the defendant did 'unlawfully and without justifiable cause molest, obstruct, and hinder the plaintiffs from carrying on' their business of manufacture and sale of boots and shoes, 'with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and wilfully persuaded and induced a large number of persons who were in the employment of the plaintiffs,' and others 'who were about to enter into' their employment, to leave and abandon the employment of the plaintiffs, 'without their consent and against their will;' whereby the plaintiffs lost the services of said persons, and the profits and advantages they would otherwise have made and received therefrom, and were put to large expenses to procure other suitable workmen, and suffered losses in their said business.

This sets forth sufficiently (1) intentional and wilful acts (2) calculated to cause damage to the plaintiffs in their lawful business (3), done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on

the part of the defendant, — which constitutes malice, and (4) actual damage and loss resulting.

The general principle is announced in Com. Dig. Action on the Case, A.: 'In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages.' The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong. This proposition seems to be fully sustained by the references in the case of Carew *v.* Rutherford, 106 Mass. 1, 10, 11.

In the case of Keeble *v.* Hickeringill, as contained in a note to Carrington *v.* Taylor, 11 East, 571, 574, both actions being for damages by reason of frightening wild fowl from the plaintiffs' decoy, Chief Justice Holt alludes to actions maintained for scandalous words, which are actionable only by reason of being injurious to a man in his profession or trade, and adds: 'How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit in his employment. Now there are two sorts of acts for doing damage to a man's employment for which an action lies; the one is in respect of a man's privilege, the other is in respect of his property.' After considering injuries to a man's franchise or privilege he proceeds: 'The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases.'

From the several reports of this case it is not clear whether the action was maintained on the ground that the wild ducks were frightened out of the plaintiff's decoy, as would appear from 3 Salk. 9, and Holt, 14, 17, 18; or upon the broader one, that they were driven away and prevented from resorting there, as the case is stated in 11 Mod. 74, 130. But the doctrine thus enunciated by Lord Holt covers both aspects of the case; as does his illustration of frightening boys from going to school, whereby loss was occasioned to the master. Of like import is the case of

Tarleton *v.* McGawley, Peake, 205, in which Lord Kenyon held that an action would lie for frightening the natives from the coast of Africa, and thus preventing them from coming to the plaintiff's vessel to trade, whereby he lost the profits of such trade.

There are, indeed, many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part, at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defence of a justifiable cause for their acts except so far as they were in violation of a superior right in another.

Thus every one has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave unless a contract exists, by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong although he did it for the purpose of promoting his own business.

One may dig upon his own land for water or any other purpose, although he thereby cuts off the supply of water from his neighbor's well. Greenleaf *v.* Francis, 18 Pick. 117. It is intimated in this case that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly it is generally held that no action will lie against one for acts done upon his own land, in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial. Frazier *v.* Brown, 12 Ohio St. 294;[1] Chatfield

[1] *Post.*

v. Wilson, 28 Vt. 49; Mahan *v.* Brown, 13 Wend. 261; Delhi *v.* Youmans, 50 Barb. 316. A similar decision was made in Wheatley *v.* Baugh, 25 Penn. St. 528; but the suggestion in Greenleaf *v.* Francis was approved so far as this, namely, that malicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable; and the case of Parker *v.* Boston & Maine Railroad, 3 Cush. 107, was referred to as showing that such loss of advantages previously enjoyed, although not of vested legal right, might be ground of damages recoverable against one who caused the loss without superior right or justifiable cause.

Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing and falls within the principle of the authorities first referred to.

It is a well-settled principle that words not actionable in themselves as defamatory will nevertheless subject the party to an action for any special damages that may occur to another thereby. Bac. Abr. Slander, C. The same is true of words spoken in relation to property or the title thereto, whereby the party is defeated of a sale or suffers damage in any way. Bac. Abr. Action on the Case, I.; Com. Dig. Action on the Case, C. So also if by a wrongful claim of title or lien the owner is prevented from perfecting a sale, or a purchaser from obtaining delivery to himself of goods, an action will lie. Green *v.* Button, 2 Cromp. M. & R. 707.

In all these cases the damage for which the recovery is had is not the loss of the value of actual contracts by reason of their non-fulfilment, but the loss of advantages either of property or of personal benefit which, but for such interference, the plaintiff would have been able to attain or enjoy. Indeed, it has been held that loss by the breach of contract, or the wrongful conduct of another than the defendant, would not be recoverable as damages under a per quod.[1] Vicars *v.* Wilcocks, 8 East, 1; Morris *v.* Langdale, 2 Bos. & P. 284; Bac. Ab. Slander, C.

This doctrine has been doubted, especially in Lumley *v.* Gye, 2 El. & B. 216, 239, where the case of Newman *v.* Zachary, Aleyn, 3, is cited to the contrary. That was an action on the case maintained for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized; the reason of the decision being 'because the defendant, by his false practice, hath created a trouble, disgrace, and damage to the plaintiff.' But the distinction is unimportant in a case like the present where the damage to the plaintiffs is alleged to have been the direct result of the wrongful conduct of the defendant, and so intended by him; except that it is significant of the point that the existence and defeat of rights by contract are not essential to the maintenance of an action for malicious wrong, when the defendant has no pretext of justifiable cause.

The case of Green *v.* Button, 2 Cromp. M. & R. 707, is especially in point in this connection. The defendant by means of a false claim of lien, and of words discrediting the plaintiff, induced one who had sold goods to the plaintiff to refuse to deliver them, whereby he was injured in his business. The court, alluding to the doubts that had been expressed as to Vicars *v.* Wilcocks and Morris *v.* Langdale, and without deciding that question, distinguished the case under consideration on the ground that, the goods not hav-

[1] That is, 'whereby the plaintiff sustained damage;' the point being that the defendant did not cause the damage.

ing been paid for, there was no absolute contract to deliver upon which the plaintiff could have his remedy against the seller; that is, as the delivery was prevented by the wrongful conduct of the defendant, and there was no binding contract broken by the seller, therefore the plaintiff was entitled to recover in his action on the case per quod.

In Gunter *v.* Astor, 4 J. B. Moore, 12, an action was maintained for enticing away workmen from their employment for a piano manufacturer. They were not hired for a limited time, but worked by the piece. The discussion indicates that damages were considered to be recoverable for the breaking up or disturbing of the business of the plaintiff, whereby he suffered the loss of his usual profits for a long period. The grounds of damage were apparently regarded as altogether independent of the mere loss of any contracts with the workmen. In Benton *v.* Pratt, 2 Wend. 385, it is held that proof of loss by the plaintiff of what he would otherwise have obtained, though there was no contract for it which he could enforce, will sustain an action for the wrongful conduct by which the loss was occasioned.

The difficulty in such cases is to make certain by proof that there has been, in fact, such loss as entitles the party to reparation; but that difficulty is not encountered in the present stage of this case, where all the facts alleged are admitted by the demurrer. The demurrer also admits the absence of any justifiable cause whatever. This decision is made upon the case thus presented, and does not apply to a case of interference by way of friendly advice honestly given; nor is it in denial of the right of free expression of opinion. We have no occasion now to consider what would constitute justifiable cause.

The second and third counts recite contracts of the plaintiffs with their workmen for the performance of certain work in the manufacture of boots and shoes, and allege that the defendant, well knowing thereof, with the unlawful purpose of hindering and preventing the plaintiffs from carrying on their business, induced said persons to refuse and neglect to

perform their contracts, whereby the plaintiffs suffered great damage in their business.

It is a familiar and well-established doctrine of the law upon the relation of master and servant that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service, known to the defendant. It has sometimes been supposed that this doctrine sprang from the English Statute of Laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description.

In Hart *v.* Aldridge, Cowp. 54, it was applied to a case very much like the present. In Gunter *v.* Astor, 4 J. B. Moore, 12, it was applied to the enticing away of workmen not hired for a limited or constant period, but who worked by the piece for a piano manufacturer. In Sheperd *v.* Wakeman, 8 id. 79, it was applied to the loss of a contract of marriage by reason of a false and malicious letter claiming a previous engagement. In Winsmore *v.* Greenbank, Willes, 577, the defendant was held liable in damages for unlawfully and unjustly 'procuring, enticing, and persuading' the plaintiff's wife to remain away from him, whereby he lost the comfort and society of his wife and the profit and advantage of her fortune. In Lumley *v.* Gye, 2 El. & B. 216, the plaintiff had engaged Miss Wagner to sing in his opera, and the defendant knowingly induced her to break her contract and refuse to sing. It was objected that the action would not lie, because her contract was merely executory and she had never actually entered into the service of the plaintiff; and Coleridge, J., dissented, insisting that the only foundation for such an action was the Statute of Laborers, which did not apply to services of that character; but after full discussion and deliberation it was held that the action would lie for the damages thus caused by the defend-

ant. In Boston Glass Manufactory *v.* Binney, 4 Pick. 425, which was for inducing workmen, skilled in several departments of glass-making, to leave the employment of the plaintiff, it was not suggested that the defendants would not have been liable if there had been an existing contract between the plaintiff and the workmen.

Upon careful consideration of the authorities as well as of the principles involved, we are of opinion that a legal cause of action is sufficiently stated in each of the three counts of the declaration. *Demurrer overruled.*

TEMPERTON *v.* RUSSELL.

Court of Appeal of England, 1893. 1 Q. B. 715.

An action is maintainable for maliciously procuring the breach of a contract and also for maliciously preventing the formation of a contract if damage follow; whether the contract be between master and servant or not is immaterial.

Application by the defendants for judgment or new trial.

The plaintiff, a master mason and builder at Hull, sued the defendants, who were respectively the presidents and secretaries of three trade unions at Hull, called the Hull Branch of the Operative Bricklayers' Society, the Hull Branch of the Builders' Laborers' Society, and the Hull Branch of the Operative Plasterers' Society, and of a joint committee of such trade unions, and members of such committee, for (1) unlawfully and maliciously procuring certain persons who had entered into contracts with the plaintiff to break such contracts, and (2) for maliciously conspiring to induce certian persons not to enter into contracts withthe plaintiff, by reason whereof the plaintiff sustained damage.

The case was tried before Collins, J., with a jury, and the

facts, so far as material to this report, appeared to be as follows:—

Certain working rules had been established for building operatives in Hull, to which the three trade unions above mentioned and certain of the master builders in Hull were parties. The 9th of such rules provided 'that no member of the Operative Bricklayers' Society shall be permitted, under any circumstances, to contract for or take by measurement, either in the whole or part, any kind of brick work, brick-pointing, or plastering that may have been contracted for or sub-contracted for under the original contract, nor to take any work of any master builder who is building property for himself; and that no member of this society shall be allowed to work on any job where labor alone is contracted for.' A firm of builders in Hull called Myers & Temperton, one of whom was the plaintiff's brother, refused to be bound by these rules, and especially rule 9. There was evidence that in order to compel them to obey the rules, an endeavor had been made to withdraw workmen from their employ, and that members of the trade unions had been fined and expelled for working for them; but the desired effect not being produced by this, the trade unions took steps to cut off the supply of lime, brick, cement, and other building materials which Messrs. Myers & Temperton might require in their business, by putting pressure on those with whom they dealt for such materials not to supply them. The plaintiff, who was one of those who supplied materials to Messrs. Myers & Temperton, refused to acquiesce in the trade unions' views, and continued to supply the firm with concrete and other building materials. On September 6, 1892, the following resolution was passed by the joint committee of the three societies: 'Resolved that this committee advises the three societies to abstain from using any lime supplied by merchants who are supplying any builders that are working contrary to joint working rule No. 9, and further that they refrain from handling or fixing any artificial stonework made by any man who is working contrary to rule 9 (see joint

working rules signed by the master builders). Artificial stonework was the material with which the plaintiff was then supplying Messrs. Myers & Temperton, and it was not disputed that this resolution was aimed at him.

It was stated by the defendant Russell in his answer to interrogatories, that it was not alleged that the plaintiff had himself broken any rule of the trade unions. The defendant Russell stated in cross-examination that he represented the three societies in the matters in question, and there was evidence which the court thought sufficient to justify the inference that his action in these matters was in support of the common action agreed upon by all the defendants.

On or about September 11, 1892, one Brentano, a builder, who had contracted with the plaintiff for the supply to him by the plaintiff of certain building materials, viz., concrete heads and sills, was summoned to appear before a meeting of the joint committee, which he accordingly did, and he there met the defendant Russell. Russell introduced him to the meeting, stating that he had contracted with the plaintiff, and told him that they had a dispute with the plaintiff, and that they would not allow their men to fix his goods. A meeting of the Operative Bricklayers' Society was held on September 12, the minutes of which stated that the dispute re Myers & Temperton being brought before the meeting, it was resolved that all members of the society refuse to use any material that may have been supplied by any builder that is not conforming to rule 9, and that any member using or handling any material, either lime, bricks, or artificial stone, will be dealt with by the society in accordance with rule 9, and that Russell was appointed as delegate during the dispute re Myers & Temperton, and was given a free hand.

Another meeting of the joint committee was held on September 19, at which all the defendants but one were present, and Brentano attended. The minutes of such meeting stated that he attended to give evidence with regard to a contract made between himself and the plaintiffs for the

supply of concrete heads and sills for fifteen houses; that he said that he had signed an agreement with the plaintiff, dated August 20, 1892, which he had shown to Russell; but that he would not want any of these heads and sills for a fortnight; and that he promised not to use any of these until notified by the committee. The minutes also stated that an agreement from one Gibson was produced at the meeting. Brentano thereupon waited fourteen days, and then wrote to Russell stating that he was ready for the concrete goods, and had not heard from the committee; and if he did not hear from them, he should at once get some on the job. An interview then took place between him and Russell, when the latter told him that he was not to get goods from the plaintiff, and that they had made arrangements for one Goode, a builder and manufacturer, to supply him with goods.

A letter was written by Russell to Goode, to the effect that the Bricklayers' Society had promised to supply Brentano with concrete work, as he had signed a contract with a firm who were in dispute with the building trade, and that the society would guaranty payment for the goods. Brentano accordingly got what he wanted from Goode, and thereupon refused to perform his contract with the plaintiff, and took no more goods from him. He stated in evidence that he was induced to act thus by a resolution mentioned to him by Russell as having been passed forbidding the members of the societies from working on plaintiff's materials, and because he knew his workmen would be withdrawn if he did not.

Evidence was given with regard to similar dealings by Russell with other persons who had entered into contracts with the plaintiff, among whom was Gibson, the person mentioned in the minutes of the meeting of September 19. Gibson stated in evidence that Russell had called upon him, and told him that the committee had passed a resolution to take extreme measures as to the plaintiff's goods, that they meant to bring him to his knees before they had done with

him, and that he would do no good till he made his peace with them. Russell however denied that he had said this. There was evidence of like nature as to other persons under contract with the plaintiff.

It was proved that the plaintiff sustained loss through the breaches of contract by Brentano and the others to the extent of £50, and there was evidence that his business had considerably fallen off in consequence of the action taken by the defendants.

The learned judge at the trial directed the jury that to induce a person who had made a contract with another to break it, in order to hurt the person with whom it was made, to hamper him in his trade, or to put undue pressure upon him, or to obtain an indirect advantage, was in point of law to do it maliciously, and that, if the jury were satisfied that the defendants or any of them had induced persons to break contracts with the plaintiff, of the existence of which they were aware, and if their object in doing so was to injure the plaintiff in his trade in order to compel him to do some thing which he did not want to do, that would be 'maliciously' in point of law, and a cause of action would be established. He also directed the jury in substance that a malicious conspiracy to prevent persons from entering into contracts with another, if followed by damage to the person conspired against, was actionable.

He left the following questions to the jury: (1) Did the defendants or any of them maliciously induce the persons named (viz., Brentano, Gibson, and others) or any of them to break their contracts with the plaintiff? (2) Did the defendants or any two or more of them maliciously conspire to induce the persons named and others not to enter into contracts with the plaintiff, and were such persons thereby induced not to make such contracts? The jury found for the plaintiff, against all the defendants, on both heads, with £50 damages on the first and £200 damages on the second. The learned judge gave judgment for the plaintiff for those amounts, and for an injunction to restrain the

defendants from inducing persons to refuse to take goods from the plaintiff, or endeavoring to induce persons to break their contracts with the plaintiff. The defendants moved for judgment or a new trial, on the ground that the learned judge misdirected the jury, and that there was no evidence to go to the jury in support of the plaintiff's claim.

Lord Esher, M. R. — In this case I propose first to state the facts of the case, as I understand the effect of the evidence, and then my views as to the law applicable to those facts.

There appear to have been three trade unions formed in Hull, consisting respectively of persons employed in each of the three branches of labor connected with the building trade there. The members of such trade unions respectively agree together to form a union, to subscribe certain amounts, and to subject themselves to certain obligations, in consideration of which they are respectively to be entitled to certain benefits. The main condition upon which the members of the union are to be entitled to the benefits of membership is, that they will obey the directions given with regard to certain trade matters by the persons authorized by all of the members to give such directions. If they do not, they may be deprived of the benefits to which they would otherwise have been entitled, or expelled from the union. Therefore the members of the union have given up their liberty of action in respect of certain matters, in the sense that they have bound themselves by agreement not to exercise it on pain of losing certain benefits.

These trade unions appear to have agreed together that certain rules, which they thought to be for their benefit, should be observed by the master builders of Hull, and that, if any builder would not observe such rules, they would act upon their respective members with a view to compelling him to do so. For this purpose they formed a joint committee, which appears to have been the authority appointed to determine what action should be taken by the individual

members of the trade unions in respect of such building controversies, and therefore to have been for this purpose the agent of each of the trade unions and other individual members of them. Apparently this committee had power to delegate their authority to one or more individual members. I think that the evidence in this case proves that they did delegate such authority to the defendant Russell, who therefore acted in what he did as the delegate of such committee, and so of each of the three unions, and in a sense of each member of them. He therefore had authority to give directions to the individual members of the unions what to do in the case of building controversies.

The trade unions and the joint committee seem to have come to the conclusion that a certain mode of carrying on building operations in Hull was detrimental to their interests or those of their constituents. They therefore agreed, as I have said, to a set of rules, one of which was the 9th rule which has been referred to.

As between themselves the members of these trade unions had a perfect right to do that and to bind themselves to comply with such rules. But these rules could not bind any person who did not belong to such unions, and they had no right to enforce obedience to them by such a person. A firm of Myers & Temperton, who were builders in Hull, thought fit to carry on their business, as they had a perfect right to do, in a manner inconsistent with the terms of rule 9. The trade unions and their joint committee objected to this, and resolved to coerce the firm into carrying on their business in accordance with the rule. Failing to effect their object by direct action upon the firm, they endeavored to coerce them through the persons who dealt with them and who supplied them with the means of carrying on their business. Among these persons was the plaintiff, a brother of one of the members of the firm. They desired to coerce the firm by preventing these persons from dealing with them. Having failed in preventing him from doing so by direct action upon him, they desired to overcome his resistance

and to coerce him in the same manner as they had sought to coerce the firm, viz., through the persons who had dealings with him. The joint committee in effect said that, if any person connected with the building trade in Hull should deal with the plaintiff for materials, the members of the unions should refuse to work for that person upon goods supplied by the plaintiff. They intended thus to coerce the plaintiff to comply with their views, and they contemplated that, if he did not submit his business would be destroyed. Though of course in point of law such other persons might be free to enter into contracts with the plaintiff, and would be bound to perform contracts made with him as before, in point of fact the committee knew that the probable result would be that his business would come to an end, and they thought that the prospect of this would have a strongly coercive effect upon him.

They were not, I think, actuated by spite or malice against the plaintiff personally in the sense that their motive was the desire to injure him, but they desired to injure him in his business in order to force him not to do what he had a perfect right to do. Amongst those who had dealings with the plaintiff were two persons named Brentano and Gibson. The result of the evidence appears to me to be that the joint committee and the defendant Russell, who was acting as the delegate of such committee, knew that Brentano had entered into a contract with the plaintiff, and also, I think, that he would in the course of his business enter in the future into other contracts with the plaintiff of a similar description. Russell lets Brentano know that, if he goes on dealing with the plaintiff harm will come to him, because none of the workmen at Hull who are comprised in the unions will touch the materials supplied by the plaintiff or will do his work. What was said by Russell to Brentano, and the previous resolution of the committee which was made known to Brentano, clearly had the object of preventing him from carrying out the contract he had already made with the plaintiff; and I should say that the inference

any fair-minded man would draw would be that they also had the object of preventing Brentano from entering into contracts with the plaintiff in the future. The object was not to injure Brentano, but to injure the plaintiff in his business, in order to force him into obedience to the views of the unions.

It was argued that the steps which the joint committee and Russell, their representative, took with regard to the men working for Brentano were only what they had a perfect right to take, that they merely gave notice or advice to such workmen that the rules were being infringed, and that they should withdraw from his employment if he carried out his contract with the plaintiff, and that the workmen could then do as they liked in the matter. It may be spoken of as 'notice' or 'advice' argumentatively; but those words do not represent the truth of the thing. These men had bound themselves to obey; and they knew that they had done so, and that, if they did not obey, they would be fined or expelled from the union to which they belonged. It was really an order which was given to them, just as much as a direction given to a servant is one. It might be said that such a direction is not an order, because the servant could not be compelled to obey it; but if he does not, he will lose his place. The unions through their joint committee, as it appears to me, ordered their members employed by Brentano to cease to work for him if he performed his contract with the plaintiff, or if he went on dealing with the plaintiff.

I think that the meaning of what Russell said to Brentano was that, if he had made a contract with the plaintiff and proceeded to perform that contract, his men would leave him; and that, if he went on dealing with the plaintiff in the future, the same result would follow. The intention was that by so acting on Brentano the plaintiff should be compelled to obey their directions, and if he did not that his business should be ruined. I think that there was clearly evidence to go to the jury against all the defendants of having been parties to these transactions. They were all

members of the unions and of the joint committee, and they none of them went into the box except Russell, which they would have done if they could have denied that they were parties to them. The evidence against the defendants with regard to the dealings with Gibson, is substantially to the same effect. This is not simply a case of men saying that they will not work for a master if he does certain things which they do not like. Brentano and Gibson were dealt with thus for the purpose of injuring the plaintiff, in order to force him into obedience to the policy of the unions, which they had no right to impose upon him.

Then what is the law applicable to these facts? The questions of law were dealt with in the argument of the defendants' counsel boldly but briefly, the main bulk of their arguments being directed to the endeavor to make out that there was no evidence that the defendants were responsible for the matters complained of. It was argued that the action for inducing persons to break a contract is confined to cases of master and servant or cases of personal service. But the case of Bowen *v.* Hall, 6 Q. B. D. 333, shows that the distinction relied on is not tenable. That was not a case of master and servant. In that case the majority of the judges in the Court of Appeal approved of the view taken by the majority of the judges in Lumley *v.* Gye, 2 El. & B. 216.[1] Their judgment, after stating that merely to persuade a person to break his contract may not be wrongful in law or fact, proceeds as follows: 'If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as Lumley *v.* Gye, and which is complained of in the present case, is therefore, because malicious,

[1] L. C. Torts, 306.

wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition, which involves the succession, it is the actual consequence.' Nothing could be more directly in point to the present case with regard to the first ground of action set up. That case is an authority which is binding on us, and it appears to me to apply to the present case.

The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable. At any rate it appears to me that, on the principle acted on in the case of Gregory *v.* Duke of Brunswick, 6 M. & G. 953,[1] where defendants conspire or combine together maliciously to injure the plaintiff by preventing persons from entering into contracts with him, and injury results to the plaintiff, it is actionable.

The judgments in the case of Mogul Steamship Co. *v.* MacGregor, 1892, A. C. 25,[2] in the House of Lords, seem to show that such a combination, if followed by damage to the plaintiff, is actionable. With regard to what was there

[1] See Torts (Students' Series), 79.

[2] *Ante*, p. 80.

said, the counsel for the defendants relied on the distinction between an indictment and a civil action, and said that, though such a combination might be the subject of an indictment for conspiracy, it could not be the subject of an action for damages. I agree that there is this distinction, viz., that in the case of an indictment when the conspiracy is proved the indictment is proved, but in the case of an action it is necessary to go further and to prove damage. Therefore it will not suffice in an action, if the jury only find that the defendants agreed together to take an unlawful course of action, but they do not find that it was taken and that damage resulted to the plaintiff, or if there is no evidence on which the jury can find that damage resulted to the plaintiff. But if there is evidence, and they do find, that damage resulted to the plaintiff, then I think what Lord Bramwell said in the case of Mogul Steamship Co. *v.* MacGregor applies, and the action will lie. He said: 'The plaintiffs also say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that, if actionable when done by one, much more are they when done by several, and if not actionable when done by several certainly they are not when done by one. It has been objected by capable persons that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two: one is that a man may encounter the acts of a single person, yet not be fairly matched against several; the other is, that the act when done by an individual is wrong, though not punishable, because the law avoids the multiplicity of crimes — de minimis non curat lex; while if done by several it is sufficiently important to be treated as a crime.'

It seems to me that that language recognizes the doctrine

of law as being that, if there is an agreement to take an unlawful course of action which amounts to a conspiracy, and the conspiracy causes damage to the plaintiff, an action will lie in respect of such conspiracy. It appears to me therefore that the combination here entered into by the defendants was wrongful both in respect of the interference with existing contracts and in respect of the prevention of contracts being entered into in the future. I cannot doubt that there was evidence from which the jury might find that people were prevented from dealing with the plaintiff by the resolution of the joint committee and the action taken by the defendants, and that the plaintiff was thereby injured, and it appears to me that the jury have so found. For these reasons I think this application must be refused.

[Lopes and A. L. Smith, L. JJ., also delivered opinions in favor of the plaintiff.] *Application dismissed.*

Lord Justice A. L. Smith distinguished the case from calling men out on strike; 'though,' said his Lordship, 'it does appear to me that, if a strike were used for the purpose and with the intent above mentioned [to injure the employer], an action would lie.'

See Flood *v.* Jackson, 1895, 2 Q. B. 21, Court of Appeal.

SLANDER AND LIBEL.

PEAKE *v.* OLDHAM.

King's Bench of England, Easter Term, 1775. 1 Cowp. 275.

"I am thoroughly convinced that you are guilty (innuendo of the death of D. D.); and, rather than you should go without a hangman, I will hang you;" *held*, actionable.

"You are guilty" (innuendo of the murder of A.); *held*, after verdict, a sufficient charge of murder, though the colloquium were only of the death.

Error from the Common Pleas in an action of slander, in which the plaintiff, now the defendant in error, declared that upon a colloquium of and concerning the death of one Daniel Dolly, the said Thomas Peake said to the said James Oldham: 1. 'You are a bad man, and I am thoroughly convinced that you are guilty (meaning guilty of the murder of the said Dolly); and, rather than you should want a hangman, I would be your executioner.' And being apprised that the said words were actionable, and being interrogated how he would prove what he said, answered that 'he would prove it by Mrs. Harvey.' 2. 'You are a bad man, and I am thoroughly convinced that you are guilty (innuendo ut antea); and, rather than you should want a hangman, I would be your executioner.' Being interrogated how he could prove the said James Oldham guilty of the murder of the said Daniel Dolly, he replied, 'I can prove it by Mrs. Harvey.' 3. 'You are guilty (innuendo ut antea), and I will prove it.' 4. 'I am thoroughly convinced that you are guilty (meaning guilty of the death of Daniel Dolly); and, rather than you should go without a hangman, I will hang

you.' 5. 'You are guilty' (innuendo, guilty of the murder of the said Dolly). By reason whereof, and to clear his character, the said James Oldham was obliged to procure, and did procure, an inquest in due form of law to be taken on the body of the said Daniel Dolly.

Upon not guilty pleaded, the jury found a general verdict upon all the counts, with £500 damages.

The defendant first moved for a new trial in C. B., which was refused; and afterwards in arrest of judgment, which rule was likewise discharged by Gould and Blackstone, JJ. (absentib. De Grey, C. J., and Nares, J.).

Lord Mansfield. — It is much to be lamented that in any sort of action the mere inattention or slip of counsel, who are not always sufficiently attentive upon what count the verdict is taken, should be fatal to the party; contrary to the truth and justice of the case, the opinion of the judge upon the merits who tried the cause, and the meaning of the jury who pronounced the verdict. However, in civil cases the rule most certainly is settled, that where a verdict is taken generally, and any one count is bad, it vitiates the whole. It has always struck me that the rule would have been much more proper to have said, that if there is any one count to support the verdict, it shall stand good notwithstanding all the rest are bad. In criminal cases the rule is so; and one cannot, therefore, but lament that the reverse is adopted in civil cases; because it is as it were catching justice in a net of form. However, this consideration will make the court lean against setting aside a verdict upon such an objection without very good reason, that is, without some apparent manifest defect; more especially in a case like the present, where the words have appeared to the jury to be so scandalous as to induce them to give a verdict with £500 damages, and where that verdict has received the sanction of the court in which the action was brought, by their refusing to grant a new trial upon an application to them for that purpose.

Let us consider, then, the grounds upon which the declaration in the present case is attempted to be impeached. Two of the counts are objected to, viz., the fourth and last. In the fourth it is said thus: 'I am thoroughly convinced that you are guilty (innuendo that you are guilty of the death of the said Daniel Dolly); and, rather than you should go without a hangman, I will hang you.' Upon this count it is argued that there are many innocent ways by which one man may occasion the death of another; therefore the words, 'guilty of the death,' do not in themselves necessarily import a charge of murder; and consequently, as no particular act is charged which in itself amounts to an imputation of a crime, the words are defectively laid. What! when the defendant tells the plaintiff 'he is guilty of the death of a person,' is not that a charge and imputation of a very foul and heinous kind? Saying that such a one is the cause of another's death, as in the case in 2 Bulstr. 10, 11, is very different; because a physician may be the cause of a man's death, and very innocently so; but the word 'guilty' implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But the defendant does not rest here; on the contrary, in order to explain his meaning, he goes on and says, 'and, rather than you should be without a hangman, I will hang you.' These words plainly show what species of death the defendant meant, and therefore in themselves manifestly import a charge of murder.

The innuendo to the words of the next count is, that they mean 'guilty of the murder of Daniel Dolly;' and the jury by their verdict have found the fact, namely, that such was the meaning of the defendant. But that is not all; for the jury find a special damage sustained by the plaintiff in being obliged, in consequence of the charge so made by the defendant, to have an inquest taken on the body of the deceased.

What! after a verdict, shall the court be guessing and inventing a mode, in which it might be barely possible for

these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are defectively laid, a verdict will not cure them. But where, from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them.

I am furnished with a case founded in strong sense and reason in support of this opinion; the name of it is Ward *v.* Reynolds, Pas. 12, Ann. B. R., and it is as follows: The defendant said to the plaintiff, 'I know you very well; how did your husband die?' The plaintiff answered, 'As you may, if it please God.' The defendant replied, 'No; he died of a wound you gave him.' On not guilty, there was a verdict for the plaintiff; and on a motion in arrest of judgment the court held the words actionable; because, from the whole frame of them, they were spoken by way of imputation. And Lord Chief Justice Parker said: 'It is very odd that after a verdict a court of justice should be trying whether there may not be a possible case in which words spoken, by way of scandal, might not be innocently said. Whereas, if that were in truth the case, the defendant might have justified, or the verdict would have been otherwise.' So here, if shown to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid, and upon the last count have found that the defendant meant a charge of murder. Therefore I am of opinion that the judgment of C. B. must be affirmed.

Aston, Willes, and Ashhurst, JJ., of the same opinion.

Judgment affirmed.

BROOKER *v.* COFFIN.

Supreme Court, New York, November, 1809. 5 Johns. 188.

Where the charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment, the words are in themselves actionable.

This was an action for slander. The declaration contained two counts. The first charged that on the 1st of February, 1808, at Schagticoke, in the county of Rensselaer, &c., for that whereas the plaintiff being a person of good name, &c., the defendant falsely and maliciously did speak and utter of and concerning the plaintiff the following false, scandalous, and defamatory words: 'She (meaning the plaintiff) is a common prostitute, and I can prove it.' The second count charged that the defendant afterwards, to wit, on the day and year aforesaid, at the place aforesaid, in a certain other discourse, &c., did falsely and maliciously speak and utter the following false, scandalous, and defamatory words, to wit, 'She (meaning the plaintiff) was hired to swear the child on me (meaning the plaintiff was hired falsely and maliciously to swear a certain child on the defendant). She (meaning the plaintiff) has had a child before this (meaning before this child, or the child which the said defendant had before said the said Nancy had been hired to swear on him), when she went to Canada (meaning a certain time when the plaintiff had been at Canada). She (meaning the plaintiff) would come damned nigh going to the State prison' (meaning that the said plaintiff was guilty of such enormous and wicked crimes as would, if punished according to the laws and statutes in such cases made and provided, condemn her to infamous punishment in the State prison). Whereas, in truth, &c.

There was a general demurrer to the first count, and a special demurrer to the second count and joinder.

SPENCER, J., for the court. — The first count is for these words, ' she is a common prostitute, and I can prove it; ' and the question arises, whether speaking these words gives an action without alleging special damages. By the statute (1 R. L. 124), common prostitutes are adjudged disorderly persons, and are liable to commitment by any justice of the peace, upon conviction, to the bridewell or house of correction, to be kept at hard labor for a period not exceeding sixty days, or until the next general sessions of the peace. It has been supposed that, therefore, to charge a woman with being a common prostitute, was charging her with such an offence as would give an action for the slander. The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged, to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F. 20. There is not, perhaps, so much uncertainty in the law upon any subject, as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they therefore adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective.

The second count is for saying of the plaintiff, 'she was hired to swear the child on me; she has had a child before this when she went to Canada; she would come damned near going to the State prison.' These words are laid as spoken at one time; if, then, any of them are actionable, it is sufficient. The innuendoes enlarge their meaning, and are not justified. One of them avers that the defendant meant that the plaintiff was hired, falsely and maliciously, to swear the child on the defendant; and another innuendo, in explaining the words, 'she would come damned near going to State prison,' alleges that the defendant meant that the plaintiff was guilty of such enormous crimes as would, if punished according to the laws, &c., condemn her to infamous punishment in the State prison. Now I do not perceive that the charge at all warrants the inference that the plaintiff had been guilty of perjury; and the cases of Hopkins *v.* Beedle, 1 Caines, 347; Stafford *v.* Green, 1 Johns. Rep. 505; and Ward *v.* Clark, 2 Johns. Rep. 11, infra, are authorities against sustaining this case.

The defendant must therefore have judgment.

WARD *v.* CLARK.

Supreme Court, N. Y., November 1806. 2 Johns. 10.

To say of a person, "he has sworn falsely," or "he has taken a false oath against me in Squire Jamison's court," or "he has falsely and maliciously charged and imposed on me the crime of perjury," is not actionable.

This cause came before the court on a return to a writ of error directed to the Court of Common Pleas of the county of Ontario. The defendant in error brought his action of slander, against the plaintiff in error, in the court below. The declaration contained two counts. In the first, the words charged to have been spoken are, 'he has sworn

falsely; he has taken a false oath against me in Squire Jamison's court.' The second count was for 'falsely and maliciously charging and imposing, on the plaintiff below, the crime of perjury.' There was a plea of not guilty, and a general verdict for ten dollars damages.

Tompkins, J., for the court. — The plaintiff in error relies on the insufficiency of the declaration in the court below, for the reversal of the judgment rendered there.

No colloquium, or averment of special damages, is contained in the declaration. The words in the first count, then, are not actionable, unless they must necessarily be understood as conveying a charge of perjury. This is not to be collected from them, because it does not appear that Jamison had any authority to hold a court known in law, or to act judicially, or to administer an oath; and, therefore, a charge of having taken a false oath before him does not necessarily impute any crime for which a person may be indicted and punished. Even if the court referred to by the words were known and recognized by this court, there is no colloquium of any cause there depending, without which the declaration is insufficient; for the words may have been spoken in common discourse. Hartwel *v.* Cole, Freem. 55; Core *v.* Morton, Yelverton, 27.

These words, 'thou art forsworn in Collet Court,' without showing any action pending there, and without further description of the court, were held not to be actionable. Skinner *v.* Trobe, Cro. Ja. 190. In Page *v.* Keble, Cro. Ja. 436, a similar judgment was given, upon a declaration upon these words, 'thou art perjured, for thou art forsworn in the Bishop of Gloucester's court.' The doctrine recognized in this court, in the cause of Hopkins *v.* Beedle, 1 Caines, 347, goes the length of determining the question upon the count now under considertion. It was there adjudged that, to convey the charge of perjury, the words must be certain and unequivocal, and state the court, or a competent officer, who administered the oath; and in a more recent

case, Green *v.* Stafford, a count for words similar to those in the first count in this declaration was held to be defective. The rule in relation to these and similar words is, that where one person calls another a perjured man, it shall be intended that the same was in a court of justice, and to have a necessary reference to it; but for a charge of false swearing no action lies, unless the declaration shows that the speaking of the words had a reference to a judicial court or proceeding. 2 Bulstr. 150, Croford *v.* Blisse; Yelverton, 27, Core *v.* Morton.

The second count appears to me to be equally defective. It is not alleged what particular words were spoken; nor does the plaintiff pretend to set forth the substance of the expressions of which he complains. No precedent, ancient or modern, warrants this form of pleading. The plaintiff contents himself with drawing his own inference from the declaration made, and alleged such inference, without apprising the defendant of the words, or substance of the words, spoken. The rule of evidence in actions of slander formerly was, that the plaintiff must prove the precise words; and that rule has been no further relaxed than to admit proof of the substance of the words laid. With respect to declaring, it has been repeatedly resolved that it is not sufficient to set forth the tenor, effect, or import of the words used. Newton *v.* Stubbs, 3 Mod. 72, and 2 Show. 436; Hale *v.* Cranfield, Cro. Eliz. 645; ib. 857. No precedent for this count was cited upon the argument, and my researches have furnished me with none. In Morgan's Precedents, 268, is to be found the only form which bears a resemblance to this count. It was for charging and imposing upon the plaintiff the crime of arson, before a magistrate, to wit, of maliciously and feloniously setting fire to a certain house, particularly described therein. In 2 Richardson's Practice, K. B. 108, is the form of a declaration, charging the substance and import of the particular words used. Without questioning the correctness of these precedents, it is evident that the same objections do not lie to

them as are presented by this count. The generality and uncertainty of the charge is a decisive objection to it. By this mode of declaring, the defendant is deprived of an opportunity of pleading matter which he might properly set up (if he was apprised, by the declaration, of the specific words), as that they were spoken with reference to a different subject, or in a different sense, than that in which the plaintiff thinks proper to apply them. Cromwell's Case, 4 Rep. 13. This he cannot do if the mode of declaring adopted by the plaintiff, in the second count, is allowed. Besides, the defendant may thereby be deprived of the advantages which might result to him from a motion in arrest of judgment, or upon a writ of error. Upon the whole, we are of opinion that the second count violates the rule of correct pleading, and leads to unnecessary surprise and vexation. The judgment below, must, therefore, be reversed for the insufficiency of both counts in the declaration.

Judgment reversed.

LUMBY *v.* ALLDAY.

Court of Exchequer of England, Hillary Term, 1831. 1 Tyrw. 217; s. c. 1 Cromp. & J. 301.

Words spoken of a person in an office of profit having a natural tendency to occasion the loss of such office, or imputing the want of some necessary qualification for or some misconduct in it, are actionable. Secus of a charge of immoral conduct not imputing want of qualification for or misconduct in office.

Case for words. The first count of the declaration stated that, before the speaking of the words, the plaintiff was, and hitherto has been, and still is, clerk to a certain incorporated company, to wit, the Birmingham and Staffordshire Gas-Light Company, and, as such clerk, had always behaved himself with great diligence, industry, and propriety, and thereby had acquired, and was acquiring, great gains and

profits in his said situation as clerk to the said company; nevertheless, the defendant, well knowing the premises, but intending to bring the plaintiff into public infamy and disgrace with and among all his neighbors, and the said persons composing the said company, and to cause it to be suspected and believed by his neighbors and subjects, and the persons composing the said company, that the said plaintiff was of a bad character and unfit to hold his situation of clerk to the said company, and an improper person to be employed by the said company, and to cause him to be deprived of and lose his situation, and to vex, &c., him the said plaintiff, on, &c., at &c., in a certain discourse which the said defendant then and there had with the said plaintiff of and concerning the said plaintiff, and of and concerning the premises, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the premises, these false, scandalous, malicious, and defamatory words following; that is to say, 'You (meaning the said plaintiff) are a fellow, a disgrace to the town, unfit to hold your (then and there meaning the said plaintiff's) situation (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas-Light Company) for your conduct with whores; I will have you in the "Argus;" you (then and there meaning the said plaintiff) have bought up all the copies of the "Argus", knowing you (then and there meaning the said plaintiff) were exposed; you may drown yourself, for you (then and there meaning the said plaintiff) are not fit to live, and a disgrace to the situation you (then and there meaning the said plaintiff) hold' (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas-Light Company).

The above words were stated with some variations in several other counts. Plea, general issue. At the trial before Alexander, C. B., at the Warwick Summer Assizes,

in 1830, it appeared that the plaintiff had for three years acted as clerk to the Birmingham and Staffordshire Gas-Light Company, at a salary of £250 per annum. The most defamatory of the words laid in the first count were proved. The 'Argus' was proved to be a publication appearing at Birmingham monthly. No proof was given of any written appointment of the plaintiff as clerk. The Chief Baron directed the jury that if in their opinion the words used would probably tend to injure the plaintiff in his office of clerk he was entitled to a verdict. The jury found a general verdict for plaintiff. Damages, 40*s*.

Bayley, B., for the court. — This case came before the court on a rule nisi to enter a nonsuit, the ground of which was, that the words proved on the trial were not actionable. Two points were discussed upon this rule: one, whether the words were actionable or not; and the other, whether this was properly a ground of nonsuit.

The declaration stated that the plaintiff was clerk to an incorporated company, called the Birmingham and Staffordshire Gas-Light Company, and had behaved himself as such clerk with great propriety, and thereby acquired, and was daily acquiring, great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words in the first count (which the learned judge here read).

The objection to maintaining an action on these words is, that it is only on the ground of the plaintiff's being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not from their tenor import that they were spoken with any such reference; and that they do not impute to him the want of any qualification which a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by De Grey, C.

J., in Onslow *v.* Horne, 3 Wils. 186, that words are actionable when spoken of one in an office of profit which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and businesses, and do or may probably tend to their damage. The same case occurs in Sir William Blackstone's Reports, 753, where the rule is expressed to be, 'if words may be of probable ill consequence to a person in a trade, or profession, or office.'

The objection to the rule as expressed in both reports appears to me to be, that the word 'probably' or 'probable' is too indefinite and loose, and that unless it is considered as equivalent with 'having a natural tendency to,' and is confined within the limits I have expressed in stating the defendant's objection, viz., that of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant. Every authority I have been able to meet with either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. Immorality only, however gross, is all which is imputed, as here charged. As at present advised, therefore, we are of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply a want of any of those qualifications which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk.[1]

[1] As to the other point in the case, it was held that, as the speaking of the words alleged was proved, there was no ground for a nonsuit; but liberty was given to move in arrest of judgment.

THORLEY *v.* KERRY.

Exchequer Chamber, Easter Term, 1812. 4 Taunt. 355.

An action may be maintained for words written, for which an action could not be maintained if they were merely spoken.

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench. The plaintiff below declared that he was a good, true, honest, just, and faithful subject of the realm, and, as such, had always behaved, and considered himself, and, until the committing of the several grievances by the defendant thereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit, to wit, in the parish of Petersham, in the county of Surrey, and also that he had not ever been guilty, or, until the time, &c., been suspected, of the offences and misconduct thereinafter mentioned to have been charged upon and imputed to him; or of any such offences or misconduct, by means of which premises he had before the committing of the several grievances deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was known, to wit, at Petersham; and also that, before and at the time of the committing of the grievances by the defendant below, as hereinafter mentioned, the plaintiff below was tenant to the Right Hon. Archibald Lord Douglas, of a messuage and premises, with the appurtenances, situate in the parish of Petersham, and he being desirous and intending to become a parishioner of the same parish, and to qualify himself to attend the vestry of and for such parish, as such parishioner, agreed with Lord Douglas to pay the taxes of and for the said house, which he so inhabited as tenant to Lord Douglas; and also that,

before and at the time of the committing of the grievances by the defendant below in the first count mentioned, the defendant below was the church-warden of and for the parish of Petersham, and the plaintiff below, so being desirous and intending to attend such vestry of such parish as such parishioner, had thereupon, by his certain note in writing, given notice to the defendant below of his agreement with Lord Douglas; yet the defendant below, well knowing the premises, and greatly envying the happy state and condition of the plaintiff below, and contriving, and wickedly and maliciously intending, to injure him in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that he has been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him, and to vex, harass, and oppress him, at Petersham aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning him, and concerning such agreement with Lord Douglas, and concerning the said note in writing, a certain false, scandalous, malicious, and defamatory libel in the form of a letter to the plaintiff below, containing, amongst other things, the false, scandalous, malicious, and defamatory and libellous matter following (accompanied with the following amongst other innuendoes), that is to say, ' My lord, I conceive, as church-warden (meaning as church-warden of the parish of Petersham), I have nothing to say to any private agreement with Lord Douglas and yourself; your note (meaning the note sent to the defendant below by the plaintiff below), and the manner it was conveyed to me, shows your lordship still possesses that perturbed spirit which I had hoped, for your own sake, after the composition and publishing of the scurrilous address of the 26th August, would have been at rest. I had before read the virulent, disrespectful, and

ungentlemanlike letters to the Rev. Mr. Marsham; I sincerely pity the man (meaning the plaintiff below) that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods. N. B. It was my intention never to have held or had communication with a writer of anonymous letters (meaning that the plaintiff below was a writer of anonymous letters), but it appears I cannot now avoid it' (thereby meaning that the plaintiff below had been and was guilty of hypocrisy and dishonorable conduct). There were other counts setting out parts only of the same letter; and the plaintiff below concluded by averring that by means of the committing of the grievances by the defendant below, the plaintiff below had been and was greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects to whom the innocence, candor, truth, integrity, reverence, and respect of the religion of the plaintiff below was unknown, had, on occasion of the committing of the said several grievances by the defendant below, from thence hitherto suspected and believed, and still did suspect and believe, the plaintiff below to have been guilty of the offences and improper conduct imputed to him as aforesaid, and to have been and still to be guilty of hypocrisy, malice, uncharitableness, and falsehood; and had, by reason of the committing of the several grievances by the defendant below, from thence hitherto, and still did refuse to have any acquaintance, intercourse, or discourse with the plaintiff below, as they were before used and accustomed to have, and otherwise would have had. And the plaintiff below had been and was by means of the premises otherwise greatly injured, to wit, in the parish of Petersham, to his damage of £2,000. Upon not guilty pleaded, the cause was tried at the Surrey Spring Assizes, 1809, when the writing of the

letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it. A verdict was found for the plaintiff with £20 damages, and judgment passed for the plaintiff without argument in the court below. The plaintiff in error assigned the general errors.

Mansfield, C. J., for the court. — This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter, which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham, that being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house; that the plaintiff in error was church-warden, and that the defendant in error gave him notice of his agreement with Lord Douglas, and that the plaintiff in error intending to have it believed that the said earl was guilty of the offences and misconducts thereinafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule. For all words of that description an indictment lies; and I should have thought that the peace and good name of individuals were sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have

had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal; for myself, after having heard it extremely well argued, and especially in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives; and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer: for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words if spoken would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may

be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, — Lord Hardwicke, Hale, I believe, Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words if spoken would not sustain it. Com. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says, there is a distinction between written and spoken scandal. By his putting it down there, as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases; but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken. Upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken. *Judgment affirmed.*

EMMENS *v.* POTTLE.

Court of Appeal of England, 1885. 16 Q. B. D. 354.

No action can be maintained against a person for selling a newspaper containing a libel if he did not know the fact, was not bound to know it, and was not negligent in not knowing it.

Appeal from the judgment of Wills, J., at the trial of an action with a jury to recover damages for an alleged libel.

The plaintiff by his statement of claim[1] alleged that 'the defendants on or about the 11th of February, 1885, at Nos. 14 and 15 Royal Exchange, in the city of London, did falsely and maliciously publish of the plaintiff, in the form of an article appearing in the newspaper known as Money, bearing date the 11th of February, 1885, by the sale thereof by their servants or agents, at such time and places aforesaid, for the defendants' benefit, to one Ernest Clarke,' certain words set out in the statement of claim. The plaintiff alleged that in consequence of the premises he had been and was greatly injured in his credit and reputation, and he claimed £5,000 damages.

By the statement of defence (par. 1) the defendants denied that they had published the alleged libel. And further and alternately (par. 2) the defendants said that 'they are news-vendors, carrying on a large business at 14 and 15 Royal Exchange, in the city of London, and as such news-vendors, and not otherwise, sold copies of the said periodical called Money in the ordinary course of their said business, and without any knowledge of its contents, which is the alleged publication.'

The plaintiff by his reply joined issue on the first paragraph of the defence. And as to the second paragraph of

[1] Substitute for the common-law declaration.

the defence the plaintiff said that 'the allegations therein contained are bad in substance and in law, on the ground that, even if the defendants sold copies of the said periodical without any knowledge of their contents and in the ordinary course of their business, as alleged in their defence, still, inasmuch as the defendants sold the said copies as news-vendors for reward in that behalf, the said allegations disclose no answer to the plaintiff's claim.'

The jury in answer to questions put to them by the judge found that 'the defendants did not nor did either of them know that the newspapers at the time they sold them contained libels on the plaintiff; that it was not by negligence on the defendants' part that they did not know there was any libel in the newspapers; and that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so.' The judge directed the jury to assess the damages provisionally, and the judge then ordered judgment to be entered for the defendants, with costs.

The plaintiff appealed.

Lord Esher, M. R. — I am afraid it will not be much satisfaction to the plaintiff, as I am going to decide against him, for me to say that it would be impossible for any one to have argued a case in better form or with better logic than he has argued his own case.

The principle is no doubt a very important one, and one well worthy of consideration. I do not intend to lay down any general rule as to what will absolve from liability for a libel persons who stand in the position of these defendants. But it is a material element in their position that the jury have found in their favor as they have done. I agree that the defendants are prima facie liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to show some circumstances which absolve them

from liability, not by way of privilege, but facts which show that they did not publish the libel.

We must first consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff; they did not write or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel. If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel.

I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and still more that they ought not to have known this, which must mean that they ought not to have known it, having used reasonable care — the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel.

If they were liable, the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shows that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and in my opinion any

proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust cannot be part of the common law of England. I think therefore that upon the findings of the jury the judgment for the defendants is right.

COTTON, L. J., concurred.

BOWEN, L. J. — The jury have found as a fact that the defendants were innocent carriers of that which they did not know contained libellous matter, and which they had no reason to suppose was likely to contain libellous matter. A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it if he knows, or ought to know, that the paper is one which is likely to contain a libel. *Appeal dismissed.*

MERIVALE *v.* CARSON.

Court of Appeal of England, 1887. 20 Q. B. D. 275.

Criticism of a play, in a newspaper, is not privileged in the technical sense. Unfair criticism is actionable. Limits of 'fair criticism' considered.

APPEAL by the defendant against the refusal of a Divisional Court to allow a new trial or to enter judgment for the defendant.

The action was brought to recover damages in respect of an alleged libel. At the trial before Field, J., it appeared that the plaintiff and his wife were the joint authors of a play called 'The Whip Hand.' The defendant was the editor

of a theatrical newspaper called 'The Stage.' Early in May, 1886, the play was performed at a theatre in Liverpool. On May 7 a criticism of the play was published in the defendant's newspaper. The part of the article charged to be libellous was as follows: —

'The Whip Hand, the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used ad nauseam, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villanous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-marker or stable-lout. And so the Marquis Colonna in The Whip Hand is offered up by the authors upon the altar of tradition and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier.'

The innuendo suggested was that the article implied that the play was of an immoral tendency. It was admitted that there was no adulterous wife in the play.

Field, J., in the course of his summing-up to the jury, said: 'The question is first, whether this criticism bears the meaning which the plaintiffs put upon it. If it is a fair, temperate criticism, and does not bear that meaning, then your verdict will be for the defendant. . . . It is not for a moment suggested by any one that the defendant is animated by the smallest possible malice towards the plaintiffs. . . . The malice which is necessary in this action is one which, if it existed at all, will be because the defendant has ex-

ceeded his right of criticism upon the play. You have the play before you; you must judge for yourselves. If it is no more than fair, honest, independent, bold, even exaggerated criticism, then your verdict will be for the defendant. It is for the plaintiffs to make out their case. They have to satisfy you that it is more than that; otherwise they cannot complain. If you are satisfied upon the evidence that it is more than that, then you will give your verdict for the plaintiffs.'

The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgment for the plaintiffs accordingly, and declined to deprive them of costs.

The defendant appealed.

Lord Esher, M. R. — This action is brought in respect of an alleged libel contained in a criticism by the defendant upon a play written by the plaintiffs. The first thing to be considered is, what are the questions which in such a case ought to be left to the jury. The first question to be left to them is, what is the meaning of the alleged libel? The jury must look at the criticism, and say what in their opinion any reasonable man would understand by it. I am not prepared to say that in coming to their conclusion they would not also have to look at the work criticised. That, however, is not very material for us to consider now. The proper question was put to the jury in the present case.

Two interpretations of the defendant's article were placed before them. One was that it meant that the play is founded upon adultery, without containing any stigma on the fact that it is so founded. The defendant's article is alleged to be libellous in that it attributed to the plaintiffs that they had written a play founded upon adultery, without any objection to it on their part, in other words, that they had written an immoral play. On behalf of the defendant it was said that the article had no such meaning, that the expression 'naughty wife' does not mean 'adulterous wife.' It would not have that meaning in every case, but

the question is whether, looking at the context of the article, it has that meaning. If the court should come to the conclusion that the expression could not by any reasonable man be thought to have that meaning, they could overrule the verdict of the jury; otherwise the question is for the jury.

What is the next question to be put to the jury? Are they to be told that the criticism of a play is a privileged occasion, within the well-settled meaning of the word 'privilege,' and that their verdict must go for the defendant unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in Campbell *v.* Spottiswoode, 3 B. & S. 769, which has never been overruled. All the judges, both before and ever since that case, have acted upon the view there expressed, that a criticism upon a written published work is not a privileged occasion. Blackburn, J., in his judgment, shows why it is not a privileged occasion. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But in the case of a criticism upon a published work every person in the kingdom is entitled to do and is forbidden to do exactly the same things, and therefore the occasion is not privileged.

Therefore the second question to be put to the jury is, whether the alleged libel is or is not a libel. The form in which that question should be put is, I think, best expressed by Crompton, J., in Campbell *v.* Spottiswoode, 3 B. & S. at p. 778. He says: 'Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice, or in Parliament, or the publication of a scheme, or a literary work. But it is always to be left to the jury to say whether

the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts; and I cannot for a moment think because he has a bona fide belief that he is publishing what is true, that is any answer to an action for libel.' He says that upon the answer to the question there stated it depends whether the article upon which the action is brought is or is not a libel. The question is not whether the article is privileged, but whether it is a libel.

What is the meaning of a 'fair comment'? I think the meaning is this: Is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case.

I think the right question was really left by Field, J., to the jury in the present case. No doubt you can find in the course of his summing-up some phrases which, if taken alone, may seem to limit too much the question put to the jury. But when you look at the summing-up as a whole, I think it comes in substance to the final question which was put by the judge to the jury: 'If it is no more than fair, honest, independent, bold, even exaggerated criticism, then your verdict will be for the defendants.' He gives a very wide limit, and I think rightly. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must

consider is this, — would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all.

I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, viz., that the plaintiffs had written an obscene play, and no fair man could have said that. There was therefore a complete misdescription of the plaintiffs' work, and the inevitable conclusion was that an imputation was cast upon the characters of the authors. Even if I had thought that the right direction had not been given to the jury, I should have declined to grant a new trial, for the same verdict must inevitably have been found if the jury had been rightly directed.

Another point which has been discussed is this: It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author.

In my opinion this appeal must be dismissed.

Bowen, L. J. — . . . The criticism is to be 'fair;' that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion provided that he does not go beyond the limits which the law calls 'fair;' and although we cannot find in

any decided case an exact and rigid definition of the word 'fair,' this is because the judges have always preferred to leave the question what is 'fair' to the jury. . . . It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.

In the case of literary criticism it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticising. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. Campbell *v.* Spottiswoode, 3 B. & S. 769, was a case of that kind, and there the jury were asked whether the criticism was fair, and they were told that, if it attacked the private character of the author it would be going beyond the limits of fair criticism. Still there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism, — I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adultery cavalierly when in fact there is no adultery at all in the story. A jury would have the right to consider the latter beyond the limits of fair criticism.

. . . . . .

Appeal dismissed.

A man who puts an article, or puts himself, before the public for approval or examination thereby calls for criticism ; hence he cannot object when it is given. Volenti non fit injuria. But criticism is no more than inference from, or opinion on facts, namely, the facts presented for criticism, the article or the person ; to charge falsely the existence of facts is a very different thing. See Torts (Students' Series), 116, 117.

HASTINGS *v.* LUSK.

Court of Errors of New York, December, 1839. 22 Wend. 410.

Language of counsel relevant or pertinent to the question before the court is absolutely privileged.

Action for slander, charging the plaintiff Lusk with perjury in an examination before a magistrate, where the defendant Hastings had been charged with threatening to shoot Lusk. Plea of the general issue. The defence, inter alia, was that the words were spoken by the defendant while conducting his own defence in said case, and that they were *relevant and pertinent* to the examination. There was also a plea of no malice. Replication traversing the pleas; issues thereon; and verdict for the plaintiff, with nominal damages. The jury found specially that the words were spoken falsely and maliciously, and that they were not relevant, and were not uttered in the course of his defence before the magistrate, but elsewhere.

Motion in arrest of judgment overruled; whereupon defendant sued out a writ of error.

The Chancellor, for the court. — The principle involved in this case is of great importance to the community, inasmuch as it involves the rights and privileges of counsel and of parties in the investigation of suits and other proceedings before our judicial tribunals; and as I believe it is the first cause of the kind which has been brought before this court of dernier ressort, and has been very fully and most ably argued here by the counsel upon both sides, I have considered it my duty to examine the law on the subject more fully than would be necessary or proper in an ordinary case of mere verbal slander; for it is not only right and proper that parties and their counsel should know what their privileges are, but also that the law should be deliberately and correctly

settled. In applying the principles of law to the case under consideration, we must, therefore, be careful on the one hand that we do not restrict counsel within such narrow limits that they will not dare to openly and fearlessly discharge their whole duty to their clients, or to themselves when they manage their own cases; and, on the other hand, we must not furnish them with the shield of Zeus, and thereby enable them with impunity to destroy the characters of whomsoever they please.

There are two classes of *privileged communications* recognized in the law in reference to actions of slander, and the privileges of counsel may sometimes fall within the one class and sometimes within the other. In one class of cases the law protects the defendant so far as not to impute malice to him from the mere fact of his having spoken words of the plaintiff which are in themselves actionable, though he may not be able to prove the truth of his allegations. But the plaintiff will be able to sustain his action for slander, if he can satisfy the jury, by other proof, that there was *actual malice* on the part of the defendant, and that he uttered the words for the mere purpose of defaming the plaintiff. In the other class of cases the privilege is an effectual shield to the defendant; so that no action of slander can be sustained against him, whatever his motive may have been in using slanderous words.

One of the earliest cases of the first class is Parson Prit's Case, reported by Rolle. 1 Roll. Abr. 87, pl. 5. Although the report of this case is very short, it will be perfectly understood by a reference to Fox's 'Martyrology,' where the author, in giving an account of the severe punishments inflicted by the vengeance of Heaven upon some of the persecutors of the Protestants during the reign of the Bloody Mary, states that Grimwood or Greenwood, as he is called by Rolle, one of the perjured witnesses who was hired to swear away the life of John Cooper, an innocent person, who was convicted and hanged, was soon after destroyed by the terrible judgment of God, being suddenly seized while in

perfect health, so violently that his bowel gushed out. From the report it appears that the defendant, Parson Prit, having been recently settled in the parish, and not knowing all his parishioners, in preaching against the heinous sin of perjury cited this case from the 'Book of Martyrs;' and no doubt commented severely upon Greenwood, and upon White, his forsworn companion, who by their perjury had caused an innocent man to be drawn in quarters and his wife and children to be left desolate. It turned out, however, that Greenwood was not dead, and that, being a resident of that parish, he was present in the church and heard the sermon, and afterwards brought a suit against the parson for charging him with perjury. But the court held that it was a *privileged communication*, and the circumstances under which the words were spoken showed there was no actual malice towards the plaintiff. See also Cro. Jac. 91. This case has been followed by a numerous class depending upon the same principle, in which the speaking of the words is held to be a privileged communication, the occasion of the speaking being such, that prima facie there could have been no malicious intent to defame the person of whom they were spoken, and the interests of society requiring that the defendant should be permitted to speak freely in the situation in which he is placed, provided he confine himself within the bounds of what he believes to be the truth. In cases of this kind the defendant may avail himself of his privilege under the plea of the general issue, even under the new rules of pleading adopted in England. This was so decided in the recent case of Lillie *v.* Price, 2 Harr. & Woll. R. 381, in the Court of King's Bench; where Lord Denman, C. J., after taking time to consult with the judges, and referring to the new rule which declares the defence under the general issue in slander shall be the same as before, says: 'We are all of opinion that this defence does not require to be pleaded specially. It goes to the very root of the action. It shows the party not guilty of malice, and consequently it is open to him without having pleaded it.' The presumption in

these cases, that there was no malice, is not rebutted by the plaintiff's merely showing that the charge against him was untrue in point of fact; it must be further shown that the defendant either knew or had reason to believe it was untrue at the time of the speaking of the words complained of. Kine *v.* Sewell, 1 Horn & Hurl. 83; 3 Mees. & Wels. 297, s.c. Proving that the defendant knew the charge to be false would unquestionably be evidence of express malice, and would destroy the defence in this class of cases.

As the plaintiff has a right to prove express malice in such cases, to sustain his action, notwithstanding the privilege, it follows, of course, that if the defendant attempt to set up his privilege as a defence by a special plea, he must not only plead the fact which rendered it a privileged communication, but he must deny the allegation in the declaration, that the words were maliciously spoken, to enable the plaintiff to go to the jury upon the question of actual malice, if he thinks proper to do so. Smith *v.* Thomas, 1 Hodges' R. 353; 2 Bing. R. N. S. 372, s. c. It follows, of course, upon a motion in arrest of judgment, if the charge of malice was denied in the plea and issue taken thereon, or if the general issue only was pleaded, so that the plaintiff would be bound to prove express malice to entitle him to a verdict in this class of cases, the court must presume it was proved upon the trial; although it should appear from the declaration or other pleadings that it was prima facie a privileged communication.

The *second class of privileges* embraces words spoken by members of Parliament, or of Congress, or of the State legislature, in the discharge of their official duties in the House, for which no action of slander will lie, however false and malicious may be the charge against the private reputation of an individual. To this class, also, belong complaints made to grand juries and magistrates, charging persons with crimes, for which no action of slander will lie, although express malice as well as the absolute falsity of the charge can be established by proof. But the law has pro-

vided a different remedy in cases of that kind, where, in addition to what has before been stated, it can be proved that the party who made the complaint had no probable cause for believing that the charge was true. Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class where they have confined themselves to what was *relevant* and *pertinent* to the question before the court, and that the motives with which they have spoken what was relevant and pertinent to the cause they were advocating cannot be questioned in an action of slander. Thus far it appears to be necessary to extend the privilege for the protection of the rights of the parties; as those rights might sometimes be jeoparded if counsel were restrained from commenting freely upon the characters of witnesses, and the co duct of parties, when such comments were relevant, for fear of being harassed with slander suits, and attempts to prove they were actuated by malicious motives in the discharge of their duty. Such I understand also to be the conclusion at which the Court of King's Bench arrived in the case of the present Lord Chief Baron of the Court of Exchequer. Hodgson *v.* Scarlett, 1 Barn. & Ald. 232; Holt's N. P. 621. Although Mr. Holt has attempted to give a statement of what occurred in banc, as well as a report of the case at nisi prius, to understand the decision correctly it is necessary to examine the case in Barnewall & Alderson, not only as to the final opinion of the judges, but also as to what occurred in the course of the argument. There was no question as to the fact that the plaintiff was nonsuited upon the opening, by Baron Wood, who held the assizes, without permitting him to go to the jury. He, therefore, had no opportunity to prove express malice, or to have it inferred from the manner in which the charge was made. His counsel upon the argument insisted that the learned judge had stopped the cause too soon, without hearing the evidence. To this it was answered, that Baron

Wood had reported that the counsel at the assizes admitted that the alleged slanderous words were used by the defendant as observations in a cause, and were pertinent to the matter in issue. But as there appeared to have been a misapprehension on this point, the court heard a statement of the proceedings in the original suit from the notes of Mr. Justice Bailey, who tried the cause. The plaintiff's counsel still contended there was a question which ought to have been left to the jury, as they were to say whether there was not malice to be *inferred* from the facts. Upon which Lord Ellenborough immediately inquired if the words were relevant, whether they were not within the protection of law? And it was in answer to this part of the argument that, in delivering his final decision in the cause, he said, although he admitted it might have been too much for the counsel to say that the attorney was wicked and fraudulent, 'It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable.'

I do not understand from this, however, that everything that in any state of facts would be relevant and pertinent to the matter in question before the court, comes within this rule of protection, where those facts which would have rendered it relevant and pertinent do not exist. Thus, if counsel, in the argument of his client's cause, should avail himself of that opportunity to say of a party, or of a witness, against whom there was nothing in the evidence to justify a suspicion of the kind, that he was a thief or a murderer, it might be a proper case for a jury to say whether the counsel was not actuated by malice, and improperly availed himself of his situation as counsel to defame the party or witness. Such appears to have been the opinion of the judges in the case of Hodgson *v.* Scarlett, and such also must have been the opinion of the Supreme Court of this State in the case of Ring *v.* Wheeler, 7 Cowen, 725; for the language of the defendant as stated in any of the seven first counts of the declaration in that case might have been

relevant and pertinent, and the words charged in the fourth and sixth counts probably were relevant to the matter before the arbitrators, if the counsel was opening his defence, and merely stating what he expected to prove, according to the case of Moulton or Boulton *v.* Clapham, 1 Rolle's Abr. 87, which was so much relied upon by the counsel for the plaintiffs in error upon the argument of this cause. Upon the authority of that case, perhaps, they should have been considered as relevant and pertinent, even after verdict.

I do not, however, consider the case of Moulton *v.* Clapham as an authority for holding that everything which may be said to the court or jury, by a party or his counsel, in the progress of a cause, as absolutely protected, although it was not relevant or pertinent to the matter in question, so as to preclude the party injured thereby from showing to a jury that the language was used maliciously, and for the mere purpose of defaming him. Many of these old cases are very imperfectly reported, and are therefore apt to mislead us, unless they are examined with care. This case, although it is to be found in D'Anvers, Sir William Jones, March, and in Rolle's Abridgment, is not stated by either two of them in precisely the same way. As reported by Sir William Jones, it would lead us to the conclusion that the court meant to decide that anything said in court by a party in disaffirmance of what was sworn against him was absolutely protected, although found by the jury to have been said maliciously; but by referring to Rolle, it will be seen that the language used by the defendant was addressed to the court, and was a mere statement that the affidavit was untrue, and that he would prove to them by forty witnesses that it was so; and therefore it was holden that the action was not maintainable, as it appeared from the plaintiff's declaration that the answer as made by the defendant to the affidavit was spoken merely in defence of himself, and in a legal and judicial way, ' inasmuch as he said he would prove it by forty witnesses.' Neither is the dictum of Cromwell's Chief Justice of the Upper Bench (Style's R. 462) to be

taken as broadly as stated by the reporter, without knowing the state of facts in reference to which the dictum was applied. I presume he must have used this language in reference to words spoken by counsel in opening the defence of his client's cause to the jury, stating what he should prove. For he immediately adds, 'It is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions.' But surely no one can for a moment suppose the learned Chief Justice intended to say that it was the duty of counsel to say anything that was not relevant to the matter in question; or to go beyond the case for the purpose of maligning a witness or the adverse party, although he might have been instructed to do so by his client. As I understand the case of Brook *v.* Montague, Cro. Jac. 90, the plea must have alleged that the words were spoken by the counsel in relation to the evidence which was *to be given* in favor of the jury against Brook, who had attainted them. He probably was instructed by his client that Brook had been convicted of felony; and if so, he was probably incapable of proceeding in the attaint against the jury, as the law then stood. Coke Litt. 130 *a;* Sleght *v.* Kane, 2 Johns. Cas. 236. The language of the reporter is, that the counsel spoke the words *in evidence.* This certainly could not be so, as there was no pretence that the counsel was a witness on the trial. I have no doubt, therefore, that the language of the plea was that the counsel, in reference *to the matters to be given in evidence*, spoke the words mentioned in the plaintiff's declaration, &c., and that by a slip of the reporter's pen, or otherwise, a part of the sentence is left out in the printed report. The case of Badgley *v.* Hedges, 1 Penning. R. 233, is like that of Moulton *v.* Clapham; for it is evident the defendant spoke in reference to the contradictory evidence which he intended to give in the cause, or which he had already given. If so, what he said was relevant, although perhaps not said at the right time. I am satisfied, therefore, that there is no law, either ancient or modern, which affords complete protection to parties or

counsel, so as to bring the language used by them in the course of judicial proceedings within the second class of privileged communications which I have stated, except where the words complained of as slanderous were relevant or pertinent to the question to be determined by the court or jury.

There may be cases which properly belong to the first class of privileged communications, arising in the course of judicial proceedings. Parties, and even counsel sometimes, misjudge as to what is relevant and pertinent to the question before the court, and especially parties who are not much acquainted with judicial proceedings; and it may be very proper in such cases to leave it as a matter of fact for the jury to determine, whether the words were spoken in good faith, under a belief that they were relevant or proper, or whether the party using them was actuated by malice and intended to slander the plaintiff. The case of Allen *v.* Crofoot, 2 Wendell, 516, appears to be a case of this kind, for it is evident that words spoken were not relevant in the judicial proceeding, or pertinent to any question then before the court. But as circumstances showed that the defendant either supposed he was bound to answer the question, or that it was relevant and pertinent to the proceedings, I think the court very properly decided that it should have been left to the jury to determine whether the defendant acted in good faith, supposing it was relevant and proper to answer the question put to him by the plaintiff, although he had not yet been sworn as a witness on the examination of the complaint which he had previously made on oath, or whether he was actuated by malice. In cases belonging to that class of privileged communications, malice in fact may be inferred from the language of the communication itself, as well as from extrinsic evidence. Wright *v.* Woodgate, 1 Gale's R. 329.

But though the slanderous words were spoken in the course of a judicial proceeding, and were relevant and pertinent to the matter in question, or the defendant may have

used them in good faith supposing them to be pertinent, without actual malice or any intention of slandering the plaintiff, yet if the facts do not appear from the pleadings or the finding of the jury, it will not aid the defendant upon a motion in arrest of judgment. On such a motion the court cannot know that the slanderous words were pertinent, or that the plaintiff did not satisfy the jury that they were not only pertinent to the matter in question before the court, but also that the defendant spoke them with a malicious intent, for the mere purpose of defaming the plaintiff and wounding his feelings. Such is the effect of the decision of the Supreme Court both in the case of McClaughry *v.* Wetmore, 6 Johns. R. 82, decided nearly thirty years ago, and the more recent case of Ring *v.* Wheeler, to which I have before referred.

Each of the counts in the plaintiff's declaration in this case contains more or less slanderous expressions, imputing the crime of perjury, in language which prima facie could not have been *pertinent* to any question before the court, for it does not appear to have been addressed to the court, but to the plaintiff himself, who was a witness there; and if the plaintiff used all the abusive language towards or in reference to the witness which is stated in either of those counts, although some of it might have been relevant to the matter in question, no jury could hesitate in coming to a correct conclusion whether that which was not pertinent was uttered in good faith or with a malicious intent to defame the plaintiff; although the defendant must have proved that he had great provocation to excuse all this harsh language, or no honest jury could have given a verdict of only six cents against him.

The defence in this case is set up by several special pleas in addition to the general issue; and the objection urged by the third point of the plaintiff in error is, that although the declaration may have been prima facie sufficient, the replications are bad, and sufficient is admitted upon the whole record to constitute a good defence. On the other hand, it

is urged that if there are any immaterial issues the pleas are bad, and as the defendant committed the first fault in pleading, it is not a case for a repleader. I have examined the special pleas particularly, and think either of them would have been held good upon general demurrer, if I am correct in the conclusion at which I have arrived as to the law of the case. It is expressly stated by Mr. Justice Buller that the defendant may, by way of justification, plead that the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question, *or* he may give them in evidence under the general issue, for they prove him not to have been guilty of speaking the words maliciously. Bull. N. P. 10. See also Lord Cromwell's Case, 4 Coke's R. 14. The two first special pleas, therefore, showing that slanderous words stated in the declaration were spoken by the defendant in the judicial proceeding, while conducting his own defence without counsel, and that they were *pertinent* to the matter in question, constituted a good bar to the action, as they brought the case within the second class of privileged communications which I have noticed. To each of these pleas there were two replications (as authorized by the Revised Statutes upon a special application to the court), each of which replications was a good answer to the plea: one replication traversed the fact that the words spoken were either pertinent or material to the matter in question, and the other traversed the allegation in the plea that the words were used by the defendant in the matter in question before the justice, *while conducting his defence* therein; and as the jury found a verdict for the plaintiff on all the issues, neither of those pleas can aid the defendant. In the last special plea the defendant, in addition to the facts stated in the two preceding pleas, also averred that the words were spoken without any malice towards the plaintiff, and therefore, if I am right in supposing that a party is not answerable for words innocently spoken by him in conducting his defence in a judicial proceeding, and without malice, although they may not have been strictly pertinent, perhaps

a replication *merely denying the pertinency* of the words would not have been a sufficient answer to this plea. The first replication to this plea does, however, in substance, put in issue the question of malicious intent as well as the pertinency of the slanderous words, although the malice is only stated by way of inducement to the traverse of the malicious intent. As that part of the replication directly negatives the allegation in the plea which it was material to negative in connection with the traverse of the pertinency of the slanderous words, its effect, after verdict, must be different from the case of a replication which merely sets up new matter as inducement to the traverse, and then traverses an immaterial allegation in the plea, leaving that which was most material unanswered. It is in this case, at most, but a misjoining of the issue, which is cured after verdict; and the jury have found in terms, in reference to this issue, that the words were spoken *falsely* and *maliciously*, and that they were *not pertinent* and material. Again, the second replication to this plea is a full answer to it, even if the first replication is stricken entirely out of the record; and upon the last replication the jury have found that the slanderous words were not uttered by the defendant while conducting his own defence on the examination before the justice, as alleged in his last special plea.

For these reasons I think the Supreme Court were right in refusing to arrest the judgment, and that their decision should be affirmed.

The court being unanimously of the same opinion, the judgment of the Supreme Court was accordingly

Affirmed.

COFFIN *v.* COFFIN.

Supreme Court of Massachusetts, March, 1808. 4 Mass. 1.

A representative in the legislature is answerable for defamation, if the words, though spoken in the house, were not spoken in the discharge of his official duty.

Action on the case for slander, in the Common Pleas of Nantucket County. The case is stated in the opinion of the court.

Parsons, C. J., for the court. — The plaintiff has commenced an action of the case, demanding damages of the defendant for an injury to his character, committed by the defendant, in maliciously uttering and publishing defamatory words, which imported that the plaintiff had committed felony by robbing the Nantucket Bank.

To this demand the defendant pleaded not guilty, and also, by leave of the court, a special plea in bar, justifying the speaking of the words, because, as he alleged, at the time when they were spoken, he and Benjamin Russell were members of the House of Representatives, then in session, and that he spoke the words to Russell, in deliberation in the house, concerning the appointment of a notary public, and that the words had relation to the subject of their deliberation.

The plaintiff, in his replication, denies these allegations, and avers that the words were spoken by the defendant of his own wrong, and without such cause as he had alleged, and tenders an issue to the country. The defendant does not demur to the replication, but joins the issue thus tendered.

Both the issues came on to trial, and it appeared from the evidence, that when the words were spoken, the defendant and Russell were members of the House of Representa-

tives, then in session. The occasion, manner, and circumstances of speaking them are thus related by Russell, the witness: He, having some acquaintance with the plaintiff, and thinking highly of his integrity, was applied to by him to move a resolution for the appointment of an additional notary for Nantucket, the town represented by the defendant. Russell made the motion, and had leave to lay the resolution on the table. The defendant, in his place, inquired where Russell had the information of the facts on which the resolution was moved. The witness answered, from a respectable gentleman from Nantucket. The resolution then passed, and the speaker took up some other business. Russell then left his place, and was standing in the passage-way, within the room, conversing with several gentlemen. The defendant, leaving his place, came over to Russell, and asked him who was the respectable gentleman, from whom he had received the information he had communicated to the house. Russell answered carelessly, he was perhaps one of his relations, and named Coffin, as most of the Nantucket people were of that name. The witness, then, perceiving the plaintiff sitting behind the bar, pointed to him, and informed the defendant he was the man. The defendant looked towards him, and said, 'What, that convict?' Russell, surprised at the question, asked the defendant what he meant; he replied, 'Don't thee know the business of Nantucket Bank?' Witness said, 'Yes, but he was honorably acquitted.' The defendant then said, 'That did not make him less guilty, thee knows.' It further appears that this conversation passed a little before one o'clock, that the election of notaries was not then before the house, but was made that afternoon, or the next day, and that the plaintiff was not a candidate for that office. And there is no evidence that the resolution laid on the table by Russell, and passed, or the subject-matter of it, was ever after called up in the house.

It does not appear from the report that it was contended by the defendant, that the words testified to did not import

the slander charged in the plaintiff's declaration, nor is the verdict objected to on that ground: the judge therefore directed the jury, that if they believed the testimony, the plaintiff had maintained the first issue. But the defendant insisted that the evidence supported the justification contained in the bar, and that by law the second issue ought to be found for him.

The question of law, therefore, arises on the second issue. Both parties had submitted the trial of this issue to a jury. The issue involved both law and fact, and the jury must decide the law and the fact. To enable them to settle the fact, they were to weigh the testimony: that they might truly decide the law, they were entitled to the assistance of the judge. If the judge had declined his aid in a matter of law, yet the jury must have formed their conclusion of law as correctly as they were able. But the judge was officially obliged to declare to the jury his opinion of the law. If this be denied, as a matter not within the jurisdiction of the Court, it must also be denied that the jury were legally authorized to decide on the law; the consequence of which would be that, when any defendant representative should plead his privilege in bar, whether the plea be true or false cannot be inquired into, because every such plea must involve both law and fact; and the judge must send the parties out of Court.

If the judge was officially obliged to declare the law to the jury, he must necessarily take notice of the law, on which the defendant relied, and give it, according to his judgment, a sound construction, applicable to the issue on trial. The law relied on is the twenty-first article of the declaration of rights.

This article he was obliged to notice and explain, according to what he judged to be its true intent and effect. If there had been any explanation of this article, by the act of any legislature, or by the judgment of any court, constitutionally obligatory on courts of law, such explanation is law, and ought to have governed the judge in his construc-

tion of the article. It is not pretended that at the time of the trial any such act or judgment existed. The only aid which the judge could receive, must have been derived from other parts of the constitution, and from the principles of the common law, by which sound rules of construction are established.

The judge accordingly gave to the jury his construction of the article, and declared to them his opinion, that the facts did not in law maintain the issue for the defendant; and the jury found a verdict for the plaintiff.

To this opinion of the judge the defendant excepted, and moves for a new trial; and on the correctness of it are we now to decide.

As the jury found a verdict agreeably to the judge's direction, it is to be presumed that they were influenced by it; and if the direction was wrong, the cause ought to be again tried by another jury, uninfluenced by an erroneous opinion of the judge in a matter of law.

The twenty-first article of the declaration of rights declares that 'The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.' On this article the defendant relies for his justification. And if it were competent to the judge, on the trial, to declare his opinion of the true intent and meaning of it, it must be competent for this court to decide whether his opinion was or was not legal; or the defendant can have no relief by his motion; unless the court are to decide, without inquiry or authority, that the opinion was against law. But I know of no action within the jurisdiction of a court, and regularly before it, in which it will not be the duty of the judges to decide all matters of law arising in it, so far as the court is competent to decide on them, according to their own apprehension of the law. Otherwise they will have no jurisdiction of legal questions; or they must act as ministerial agents, deciding according to the will of others.

In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect, the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on mesne (or original) process, during his going to, returning from, or attending, the General Court. Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house or by an act of the legislature.

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

He cannot be exercising the functions of his office as

member of a body, unless the body be in existence. The house must be in session, to enable him to claim this privilege; and it is in session, notwithstanding occasional adjournments, for short intervals, for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions, as a representative, in committee, either in debating, in assenting to, or in draughting a report. Neither can I deny the member his privilege, when executing the duties of his office, in a convention of both houses, although the convention should be holden in the senate-chamber.

To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted. But he may have other compensation awarded to him by the house, who have power, as a necessary incident, to demand of any of its members a retraction, or apology, of or for anything he has said, while discharging the duties of his office, either in the house, in committee, or in a convention of the two houses, on pain of expulsion. But if it is allowed that the remedy is inadequate, then a private benefit must submit to the public good. The injury to the reputation of a private citizen is of less importance to the Commonwealth than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions.

A more extensive construction of the privileges of the members secured by this article, I cannot give; because it could not be supported by the language, or the manifest intent, of the article. When a representative is not acting

as a member of the house, he is not entitled to any privileges above his fellow-citizens; nor are the rights of the people affected if he is placed on the same ground on which his constituents stand. He is secured the liberty of travelling to the house, of attending his duties there, of exercising the functions of his office as a member, and of returning home. But so careful were the people in providing that the privileges, which they, for their own benefit, had secured to their representatives, should not unreasonably prejudice the rights of private citizens, that a member may be arrested upon execution in a civil suit, in cases where he could not be lawfully arrested on original or mesne process. And that offences against law may be duly and seasonably punished, this privilege is not extended to arrests on criminal prosecutions, in any case where by law the member may be prosecuted as a criminal.

If this very liberal construction of the twenty-first article be just; if it be warranted by its language; if it be consonant to its manifest intent and design, — the question before the court lies in a narrow compass.

Was Coffin, the defendant, in speaking the defamatory words executing the duties of his office? Or, in other language, was he acting as a representative? If he was, he is entitled to the privilege he claims; if he was not, but was acting as a private citizen, as a private citizen he must answer.

Upon information given by the plaintiff to Russell, a member, he had moved a resolution providing for the choice of another notary for Nantucket; and on Russell's stating that his information was from a respectable person from that place, the resolution had passed; the house had proceeded to other business; and the subject-matter of the resolution, or of the information, was not in fact before the house, although it is certain that any member might have moved to rescind the resolution. Russell, his brother member, was in the passage-way, conversing with several gentlemen: the defendant came to him, and inquired the name of

Russell's informant, who, he had declared, was a respectable gentleman from Nantucket. Was this inquiry, thus made, the act of a representative, discharging his duty, or of a private citizen, to gratify his curiosity? It was the former, say the defendant's counsel. Whether it was or not, certainly it was innocent. But to pursue the evidence: the defendant was answered: whatever was his motive, he had received the information. If, upon it, he intended again to call up the resolution, he might have done it. But no motion for that purpose was ever made. He then utters to Russell the defamatory words. What part of his legislative duty was he now performing? It is said that he might apprehend that the plaintiff was a candidate for the office of notary, and that his motive might be to dissuade Russell from giving him his vote. But there is no evidence that the defendant supposed the plaintiff to be a candidate, and it is in evidence that the plaintiff was not a candidate. It is also apparent that the defendant believed that Russell was not ignorant of the indictment against the plaintiff, and of his acquittal. I cannot, therefore, assign to the defendant any other motive for his indiscreet language, but to correct Russell for giving to the plaintiff the appellation of a respectable gentleman, and to justify the correction by asserting that an honorable acquittal, by the verdict of a jury, is not evidence of innocence. It is not, therefore, possible for me to presume that the defendant, in using thus publicly the defamatory words, even contemplated that he was in the discharge of any official duty. This inquiry by the defendant, and his replies, might have been made, for all the purposes intended by him, in State street, or in any other place, as well as in the representatives' chamber; and it is not easy for me to conceive that any language or conduct of a representative must be considered as official, merely because he chooses the representatives' chamber for the scene.

But it has been urged that the privilege must extend to a representative giving information to a brother member, on

any subject before the house; or which may be expected to come before the house; for the information may be necessary to enable the member informed to discharge his official duty with ability and propriety. Without remarking the essential distinction between a man's seeking information on subjects relating to his office, and his actual execution of its functions, and without observing the extreme difficulty of supposing that defamatory words, maliciously uttered, can ever be considered as useful information, I do clearly admit that a representative will certainly be entitled to his privilege in all cases, where he shall give information in the discharge of his official duty; although the manner may be irregular, and against the rules of the house. But when a representative pleads his privilege, to entitle himself to it, it must appear that some language or conduct of his, in the character of a representative, is the foundation of the prosecution, for in no other character can he claim the privilege.

But in actions for defamatory words against a member, he may, in cases to which his privilege does not extend, defend himself like any other citizen, by proving that the words were spoken for a justifiable purpose, not maliciously, nor with a design to defame the character of any man. And this defence will avail every man charged with slander, although it may be that the words uttered are not true. I do not, therefore, consider any citizen, who is a representative, answerable in a prosecution for defamation, where the words charged were uttered in the execution of his official duty, although they were spoken maliciously; or where they were not uttered in the execution of his official duty, if they were not spoken maliciously, with an intent to defame the character of any person. And I do consider a representative holden to answer for defamatory words, spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives'

chamber to another member, but not uttered in executing his official duty, would be to extend the privilege farther than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny — an effect which never has been, and, I confidently trust, never will be, endured by any House of Representatives of Massachusetts.

It has been said that, although the judge at the trial had no other information of the nature and extent of the defendant's privileges but what he derived from the constitution, yet that, since the trial on the first of March instant, the house passed a resolution declaratory of the privileges of its members, to which declaration we are obliged to conform in our judgments; because the house is to judge exclusively of its own privileges.

That the house is to judge exclusively of its privileges, for certain intents and purposes, is very certain; but if it is to exclude courts of law from judging of the privileges of its members in every case, the consequences would be unfortunate to the members. If a member, in any action, pleads his privilege, he submits it to the judgment of the court; and if it be allowed, it is by virtue of the judgment of the court. All, therefore, which the court could do, upon such an hypothesis, would be to reject the plea, lest, in judging of it, it should invade the privileges of the house.

The resolution declares that words spoken by any member, within the walls of the house, relative to any subject under their consideration, either in their separate capacity, or in a convention of both branches of the legislature, whether the member speaking such words addresses himself in debate to the chair, or deliberates or advises with another member respecting such subject, are alone and exclusively cognizable by the house; and that for any other tribunal to take cognizance of words thus spoken would be a violation of the twenty-first article of the constitution. And the words relied on for the defendant are, ' whether the member speaking such words addresses himself to the chair, or deliberates or advises with another member respecting such subject.'

As it is admitted by the defendant's counsel that this Court is competent to construe the twenty-first article, in order to decide whether the facts in the case bring the defendant within it, so also it is admitted that the Court is competent to construe this resolution for the same purpose. The resolution, judging from the face of it, does not appear to be an act of the house in any case of contempt on trial before it, but to be a general declaration of the privileges secured to the members by the twenty-first article of the constitution; because it is declared that an invasion of these privileges would be a violation of that article. I consider the house, therefore, as defining the constitutional privileges of its members, relating to words spoken by them. In this declaration, the words must be spoken on a subject before the house, and either addressed to the chair, or by one member to another by way of deliberation and advice on the same subject. In either case, the words must be spoken officially, although in the latter case they may be spoken in a disorderly and irregular manner. The house has not, therefore, claimed any privileges for its members, when prosecuted for slander, unless the words charged were spoken officially in the character of a representative. This inference is inevitable, unless it should be unreasonably concluded that one member could deliberate or advise with another member, on a subject before the house, having abandoned his official duty, and acting as a private citizen. Whether I do or do not allow to the resolution, thus passed, the force of law, I am satisfied that it claims no privileges but what are secured to the members by the constitution, of which, as far as it extends, it is in affirmance. The resolution does not, therefore, in my opinion, aid the defendant; for it appears, from the facts in the case, that the defamatory words, charged on the defendant, were not spoken by him on a subject before the house, either in an address to the chair, or by way of deliberation or advice with another member.

It has been urged that a declaration of privileges made by

the house, whether those privileges do or do not belong to it, has the force of law, and is obligatory, in all cases, on the courts of justice. A declaration of that nature is not now before us; for I am satisfied that the house has all the privileges claimed by its resolution. Whenever a declaration shall be made by the house, claiming privileges not belonging to it in the opinion of the judges of a court of law, let the judges then decide the question. The merits of it must depend on a careful consideration of the constitution, with a due regard to the privileges and prerogatives of the house resulting from it. On this subject I give no opinion; but from the observations I have already made, it may not be improper to declare, that if it had appeared to me that the words charged on the defendant had been officially spoken by him without the walls of the representatives' chamber, either in a convention of the two houses holden in the senate-chamber, or in a committee, while executing the commission of the house then in session, as I am now advised, I would have allowed him his privilege, although, by the resolution produced, the house seem to confine its privileges to words spoken within the walls of the representatives' chamber.

But the danger of conflicting jurisdictions has been insisted on with much ability and eloquence, if we should support the present action. I am sensible that where a conflict of final jurisdictions exists in any State, there must be a defect in the laws of that State. In my opinion, this State is not liable to the opprobrium; for I do not conceive that final conflicting jurisdictions here are consistent either with our constitution or statutes.

To introduce examples from the British House of Commons cannot much illustrate the subject. The privileges of that house are not derived from any written constitution, but have been acquired by the successful struggles of centuries, directed either against the monarchy or an hereditary aristocracy. The exertions of the commons have generally been popular, because the people were supposed

to reap the fruits of them. In this State, we have a written constitution, formed by the people, in which they have defined, not only the powers, but the privileges, of the house, either by express words, or by necessary implication. A struggle for privileges, in this State, would be a contest against the people, to wrest from them what they have not chosen to grant. And it may be added that the grant of privileges is a restraint on the rights of private citizens, which cannot be further restrained but by some constitutional law. These principles are perfectly consistent with the resolution of the house, which is not a claim of any further privileges not granted by the constitution, but a description of some, and only of some, privileges there granted.

I consider the House of Representatives not only as an integral branch of the legislature, and as an essential part of the two houses in convention, but also as a court having final and exclusive cognizance of all matters within its jurisdiction, for the purposes for which it was vested with jurisdiction. It has jurisdiction of the election of its members; of the choice of its officers; of its rules of proceeding; and of all contempts against the house, either in its presence, or by violating the constitutional privileges of its *members*. When the house is proceeding as a court, it has, exclusively, authority to decide whether the matter before it be or be not within its jurisdiction, without the legal control of any other court. As to contempts, the house proceeds against the offender to punish the contempt. Courts of law proceed to punish offences against the State, and to redress private wrongs. The same act may be a contempt against the house, an offence against the State, and an injury to an individual; and in all these respects, proceedings may be had against the offender.

When the house decides in a question of election, it can conclusively decide on the right of voting claimed by any elector, so far as is necessary to settle the election. But an elector illegally deprived of his right of voting may

demand redress for this wrong against the selectmen by a suit at law. This was decided in the cases of Gardiner and of Kilham against the Selectmen of Salem,[1] where the only defence set up was, that the plaintiffs had no right to vote. Upon this question, the judgments of both courts, however rendered, could be executed without any interference. Let me illustrate the subject by supposing a case or two. A member is assaulted in the town in which the house is in session, and is cruelly beaten, for words spoken in the house in the execution of his duty. The house may proceed against the assailant for a contempt; and cannot the member prosecute him at law for damages? And may not the grand jury indict him for a breach of the peace? And neither can the proceedings of a court of law control the proceedings of the house, nor can the proceedings of the house control the courts of law. The judgments of each court, whatever may be the result, can be executed without any interference. Suppose a public officer indicted for extortion, and upon trial acquitted at law; cannot he afterwards be convicted by the senate on an impeachment? Both judgments may be executed without interference. The courts of law proceed to punish the offender, and he is acquitted. The power of the senate is censorial, and exercised to preserve purity in office. If it should be supposed that the senate cannot proceed after an acquittal at law, it should be remembered that, by the express provision of the constitution, courts of law may proceed after a conviction in senate; and in the proceedings at law the jury may acquit; and it could not have been intended to place the senate as subordinate to a court of law. The true design of that provision was a mere cautionary declaration that the proceedings in the senate were not to *punish* offenders against the state, but for a different end. And I would add that, in the present case, if the house, of which the defendant was a member, had proceeded against the plaintiff for a contempt in suing this action, — whatever had been the

[1] 2 Mass. 236, 244.

result of its proceedings, this court could not have interfered, or granted any relief, until the sentence had been performed. And as this judgment could not have affected those proceedings, so neither could those proceedings have controlled the authority of this court. The two courts are independent, and have each exclusive cognizance of the matters within its jurisdiction; and although the transaction animadverted on may be the same, yet the proceedings are for different purposes, and the judgments of both courts may be executed without any interference. There cannot, therefore, be any conflict of jurisdictions.

Extreme cases of the abuse of power, either in the House of Representatives, or in this court, may be imagined; but they are not to be argued from, to influence legal decisions.

Since the argument of this cause, I have examined the subject with as much attention as I have been able to give to it, amidst all the business of the court pressing on us, with a strong disposition to guard the privileges of the house, and of its members, because their privileges are essential to the rights of the people, and ought to be supported, by every good citizen, according to their true limits. From this examination I am satisfied that, whatever may be our decision of the question, it is within our jurisdiction thus brought before us; and that no breach of the privileges of the house, or a conflict with its jurisdiction, can result from our determination.

I am convinced, after much consideration, that the facts presented by the case do not entitle the defendant to the privilege which he claims; and that, for this cause, the verdict ought not to be set aside. Under this impression, to give a different opinion would be a desertion of a solemn duty, and a gross prevarication with my own conscience.

In this opinion of the Chief Justice, the other judges, viz., Sedgwick, Sewall, Thatcher, and Parker, severally declared their full and entire concurrence.

SHECKELL *v.* JACKSON.

Supreme Court of Massachusetts, September, 1852. 10 Cush. 25.

The source of a newspaper's information is immaterial as to a cause of action against it for libel. Public anxiety creates no privilege in favor of a newspaper.

THE case is stated in the opinion of the court.

SHAW, C. J., for the court. — This is an action on the case for a libel published of the plaintiff, an inhabitant of the District of Columbia, charging him with treachery and bad faith, in regard to money received by the plaintiff, to obtain the manumission of a fugitive slave, and then inviting the slave to go into a slave district, for the purpose of again placing him in a state of slavery. The case was original in this court; was tried before Mr. Justice Fletcher, and the only question before us arises on his report.

A witness, described as a news-collector, having testified that he wrote a part of the article complained of, and the part tending perhaps most to slander the plaintiff, it was on the part of the defendants proposed to ask him 'what inquiries and examinations he made, and what sources of information he applied to, before making the communications' tending to charge the plaintiff with dishonesty and bad faith. This was objected to and rejected. This we think was correct. The answers could have no tendency to prove the truth of the facts charged; and for the purpose of proving reports and rumors, from whatever source derived, we think they were immaterial and inadmissible.

The same objection we think lies, with increased strength against the offer by the defendants to prove that there was a general anxiety in the community lest Ringgold, the colored man in question, had been deceived in the transactions with the plaintiff referred to, and thus reduced to

slavery. Without any attempt or offer to prove the fact that the plaintiff had been guilty of the deception imputed to him, the general anxiety, if it existed, afforded no justification or excuse for charging such misconduct upon the plaintiff, in a newspaper intended for general circulation in the community.

The other exception related to the directions given by the judge to the jury in matter of law, which were as follows:

'On the part of the defendants, it is maintained, that when a party has a duty to perform, and in the performance of that duty states honestly what he believes to be true, the occasion furnishes a justification for the statement, though he may be mistaken; and that the case of the defendants comes within the principle. It is true there is such a class of cases. When a party has a duty to perform, and states honestly what he believes to be true, though mistaken, the occasion furnishes a justification, unless the plaintiff can show express malice. The occasion in such a case prevents the implication of malice. This principle is stated in the case of Bradley *v.* Heath, 12 Pick. 163.'

'So in this case, if the occasion were such an one as comes within this principle, then it would prevent the implication of malice, for publishing what was not true, and the plaintiff would not recover without showing express malice.'

'But in point of law, the occasion of this publication was not such an one as affords a justification to the defendants for publishing what was not true. The defendants' case does not come within the privileged or excepted cases from the general rule. But if the publication is libellous upon the plaintiff, upon the definition of libel as before given to you, then the defendants are by law responsible to the plaintiff in damages for the injury they have done him.'

'Then it has been urged upon you that conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They

have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehoods to the injury of others with impunity.'

These instructions, in the opinion of the court, are correct in point of law, carefully illustrated and qualified, and were well adapted and applied to the circumstances of the case. *Judgment on the verdict for the plaintiff.*

De CRESPIGNY *v.* WELLESLEY.

Common Pleas of England, Hilary Term, 1829. 5 Bing. 392.

It is no defence to an action for libel that the defendant had the libellous statement from another, and, upon publication, disclosed the author's name.

To the ninth count of a declaration for libel, the defendant, after pleading the general issue, pleaded, secondly, as to the publishing, and causing and procuring to be published, the following parts of the said supposed libel of and concerning the said plaintiff, in the said ninth count of the said declaration mentioned, with the intent and meaning therein mentioned; to wit, 'Mr. De Crespigny told Mr. Wellesley he was wrong in supposing he had spoken to his father, Sir W. De Crespigny (meaning the said plaintiff); he had written a letter to him, and he had his (meaning the said plaintiff's) answer, in which he admitted the fact; and that his wife, Mrs. De Crespigny, and himself had the letter; that all the family knew of the circumstance (intimacy) that his poor brother William, who is dead, was extremely jealous of his father (meaning the said plaintiff), and had been turned out of his house; that his mother had told him that a child had been born, and that it had been her conclusion that his brother Herbert had spoken to his father (meaning to the said plaintiff) upon the subject, who replied that he (meaning the said plaintiff) entreated that so distress-

ing a subject might not be again mentioned to him (meaning to the said plaintiff); the Rev. Mr. De Crespigny told Mr. Wellesley he thought he was quite right not to allow his children to remain with people so infamously connected. Mr. De Crespigny informed Mr. Wellesley he had seen the Miss Longs yesterday at their house in Berkshire, and that he had directly accused Miss Emma Long with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment; that he then stated to Miss Dora Long that Miss Emma Long had intrigued with his father (meaning with the said plaintiff), and that Mr. Wellesley (meaning the said defendant) intended to publish the whole story, unless they immediately gave up his children. Miss Long replied, that she had nothing to do with her sister's intrigue, and she must be responsible for her own conduct; but that no one would believe what Mr. Wellesley said. Mr. De Crespigny assured Mr. Wellesley that she never denied her sister's having committed the fault. Mr. De Crespigny told her his father had confessed it (not denied it); to which she made no reply, but put herself into a violent passion, and said she did not wish to see any of Mr. Wellesley's friends within her house; notwithstanding such declaration, she invited Mr. De Crespigny to dine with them, and to sleep at Binfield House; the above minutes were shown to Captain De Brooke, and on the part of the Rev. H. C. De Crespigny he admitted them twice to be correct, with the exception of one word, viz., that for *confessed it* the words *not denied it* ought to be substituted.' The said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have and maintain his aforesaid action thereof against him, because he says that before the publishing of the said parts of the said supposed libel in the said ninth count of the said declaration mentioned, to wit, on the 5th day of December, in the year of our Lord 1827, at, &c., the said Rev. H. C. De Crespigny told the said de-

fendant that he was wrong in supposing that he, the said H. C. De Crespigny, had spoken to his father, Sir W. De Crespigny; he had written a letter to him, and that he had his (meaning the said plaintiff's) answer, in which he (meaning the said plaintiff) admitted the fact; and that his (the said H. C. De Crespigny's) wife and himself had the letter; that all the family knew of the intimacy; that his poor brother William, who was dead, was extremely jealous of his father (meaning the said plaintiff), and had been turned out of his house; that his brother Herbert had spoken to his father (meaning the said plaintiff) upon the subject, who had replied that he (meaning the said plaintiff) entreated that so distressing a subject might not be again mentioned to him (meaning to the said plaintiff); and the said H. C. De Crespigny then and there further told the said defendant he thought he was quite right not to allow his children to remain with people so infamously connected. And the said H. C. De Crespigny afterwards, and before publishing the said libel in the introductory part of this plea mentioned, to wit, on, &c., at, &c., further told the said defendant that he had seen the Misses Long yesterday at their house in Berkshire, and that he, the said H. C. De Crespigny, had directly accused Miss Emma Long with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment; that he then stated to Miss Dora Long that Miss Emma Long had intrigued with his father (meaning the said plaintiff), and that Mr. Wellesley (meaning the said defendant), intended to publish the whole story unless they immediately gave up his children. That Miss Long replied, she had nothing to do with her sister's intrigue, and that she must be responsible for her own conduct, but that no one would believe what Mr. Wellesley said; and the said H. C. De Crespigny assured the said defendant that she never denied her sister's having committed the fault. Mr. De Crespigny told her his father had not denied it; to which she made no reply, and said she did not wish to see any of Mr. Wellesley's friends within her house; notwith-

standing such declaration she invited Mr. De Crespigny to dine with them, and to sleep at Binfield House. And the said defendant further said, that before the publishing the said parts of the said supposed libel in the introductory part of this plea mentioned, to wit, on, &c., at, &c., certain minutes and statements in writing were made as and for correct minutes and statements of the said communications and representations so made by the said H. C. De Crespigny as aforesaid, and the same were then and there revised and corrected by the said H. C. De Crespigny; and when so revised and corrected contained, and still do contain, the words and matter following, with the interlineations and alterations as follows. (Here followed a statement of the minutes as revised and corrected by the Rev. H. C. De Crespigny. The expression *not denied*, was substituted for *confessed;* and the statement, that his mother told him a child had been born, was erased; in other respects the minutes corresponded with the foregoing statements.)

And the said defendant further said, that afterwards, and before the publishing of the said parts of the said supposed libel, in the said ninth count mentioned, to wit, on, &c., at, &c., the said H. C. De Crespigny caused the said minutes and statements, so revised and corrected by him as aforesaid, and containing the words and matter last aforesaid, to be delivered to him, the said defendant, as and for a true and correct statement of the conversation he, the said H. C. De Crespigny, had had with the said defendant as aforesaid; and the said minutes were theretofore, to wit, on, &c., at, &c., shown to the said Captain De Brooke, in the presence of the said Colonel Freemantle, Mr. Saville Lumley, M.P., and Colonel Paterson. And the said defendant further said, that, at the time of the publishing the said parts of the said supposed libel in the said ninth count, and in the introductory part of this plea mentioned, as therein mentioned, he, the said defendant, also published that the same had been so published to him by the said H. C. De Crespigny, therein mentioned as aforesaid; wherefore he, the

said defendant, at the said several times, when, &c., in the said ninth count mentioned, did publish of and concerning the said plaintiff the said several parts of the said supposed libel in that count mentioned, as he lawfully might for the cause aforesaid, and this he is ready to verify, &c.

To this plea there was a demurrer; many causes of demurrer were specified and argued; but as the decision turned altogether on the general question, it is unnecessary to state the other points.

Best, C. J., for the court. — Great industry has been bestowed upon this case by my learned brothers by whom it was argued, but no case has been cited in which the principle, extrajudicially applied by the fourth resolution in Lord Northampton's Case to oral slander, has been extended to libel. We might relieve ourselves from the difficulty of deciding this question by saying that the technical objections taken to the pleas by the demurrer are sufficient to entitle the plaintiff to judgment. But we think it more proper for us to pronounce our judgment on the principal question raised by these pleadings, namely, whether a man who receives from the hands of another a libel on any person is justified in publishing that libel, provided that in his publication the name of the person from whom he received it is mentioned? We do not hesitate to say, that even if we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man at the time of his speaking the words names the person who told him what he relates, he may plead to an action brought against him that the person whom he names did tell him what he related, such a justification cannot be pleaded to an action for the republication of the libel.

If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter

case, what has been said is known only to a few persons, and, if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove.

The reason which Lord Coke gives, why in the case of oral slander you should name the author, proves that you must not be allowed to publish written calumny; he says that, unless you mention the name of the author, it might be a great slander of an innocent; 'for if one who has læsam phantasiam, or is a drunkard, or of no estimation, speaks scandalous words, if it shall be lawful for a man of credit to report generally that he had heard scandalous words without mentioning his author, that would give greater color and probability that the words were true in respect of the credit of the reporter than if the author were mentioned; for the reputation of every good man is dear and precious to him.' Of what use is it to send the name of the author with a libel that is to pass into a country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind, or the delusion of a lunatic. There is no allegation in this case that the defendant believed this statement; on the contrary, it is to be observed that Mr. De Crespigny struck out a very material part of the statement, and yet the defendant published it, although he must have known that it was not correct. I allude to that part in which the defendant makes

Mr. De Crespigny say that his mother had told him that a child had been born. Although he tells you in his plea that De Crespigny had erased those words, yet he justifies the publishing of them. The declarations of a son and dying wife are made the means of blasting the character of a father and husband. If, without any allegation that its contents were true, or that the publisher had any reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the characters of any persons they might be disposed to calumniate; there will be no difficulty in getting wretches, who would be better off within the walls of a prison than they are without, to furnish such as will pay for them with any statements they may desire respecting the character of any person whatsoever.

Written communications are often made for the information of those to whom they are given, and for their information only. Such communications contain facts necessary to be known by those to whom they are made, but not fit to be divulged to the whole world. It may be important to the interest of the members of a family to know of things which have taken place in their family, and which having been disclosed with a due regard to the interest of the person to whom the disclosure was made, although injurious to some other person's character, would not be libellous. Can it be permitted that persons possessing such communications should publish them to the world, if they only give the names of those by whom they were made? Such a doctrine might furnish amusement for the lovers of scandal, but it would cause much misery in many families. It is a principle of our law that whoever wilfully assists in the doing an unlawful act becomes answerable for all the consequences of such act. What reason is there to except the circulation of slander out of this rule? He who prints and publishes what was given to him in manuscript has to answer for by far the greatest part of the mischief that the statement has occasioned. But it has been said at the bar that these pleas

are prima facie answers, and that the circumstances that are to show that the publication was not honestly made are to come from the plaintiff in his replication, or to be proved under the general replication de injuria. The defendant ought to know the state of the author, and the circumstances in which he wrote the libel. The plaintiff may be ignorant of those circumstances. The law requires that facts should be proved by those who ought to have the means of knowing them, and not by those who must be presumed ignorant of them. But these pleas do not present a prima facie defence. They offer nothing which requires an answer. Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong. If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. This seems to be a case of the latter description; but, if published either with or without the authority of the writer, it can never be a justification, nor can the previous publication be set up in mitigation of damages, without proof that the author believed it true, and had some reasonable cause for publishing it. We are not to endure a reproach against our neighbor. What, then, is our moral duty if we hear anything injurious to the character of another? If what we have been told does not concern the public or the administration of justice, we are to lock it up forever in our own breasts. We are on no account to report it to gratify our enmity to any particular person, or, for that more common cause of slander, to gratify the malice that exists by a desire to raise ourselves above, or to keep ourselves upon, an equality with our neighbors by injuring their characters.

The statements published relative to the plaintiff do not concern the public; they are not disclosed in the course of the administration of justice; nor does it appear from the pleadings that the defendant, in making this virulent attack on the plaintiff, has the excuse that he published this paper in his own defence; but before he used this statement in any manner, he was bound to satisfy himself that it was true; and he does not even say that he believed it. Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter. We are warranted in saying that the defendant has made a very serious charge against the character of the plaintiff, without being prepared to make it good; for if he could have proved that what he published was true, he might have put the truth of the statement on the record as his justification.

Judgment for the plaintiff.

ASSAULT AND BATTERY.

STEPHENS *v.* MYERS.

Common Pleas of England, Nisi Prius, Trinity Term, 1830.
4 Car. & P. 349.

To constitute an assault with the hands it is not necessary that the parties should be within reach of each other; enough that the attempt to reach is prevented.

Assault. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea, not guilty.

It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being six or seven persons between him and the plaintiff. The defendant, in the course of some angry discussion which took place, having been very vociferous, and having interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched toward the chairman, but was stopped by the church-warden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to reach the plaintiff; but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman.

Tindal, C. J., in his summing up, said: It is not every threat, when there is no actual personal violence, that con-

stitutes an assault; there must in all cases be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped. Then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise, you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff.

COLE *v.* TURNER.

King's Bench of England, Nisi Prius, Easter Term, 1705.
6 Mod. 149; s. c. Holt, 108.

To touch another in anger, though in the slightest degree, or under pretence of passing by, is in law a battery.

Holt, C. J., upon evidence in trespass for assault and battery, declared,

First, that the least touching of another in anger is a battery.

Secondly, if two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery.

Thirdly, if any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to such degree as may do hurt will be a battery.

BROWN *v.* KENDALL.

Supreme Court of Massachusetts, October, 1850. 6 Cush. 292.

It is no trespass that in the reasonable attempt, with a stick, to separate dogs fighting, the owner of one accidentally hits the owner of the other with the stick.

This was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before Wells, C. J., in the Court of Common Pleas, that two dogs belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion, — were the subject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The defendant requested the judge to instruct the jury, that ' if both the plaintiff and defendant at the time of the

blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.'

The defendant further requested the judge to instruct the jury, that, 'under the circumstances, if the plaintiff was using ordinary care and the defendant was not, the plaintiff could not recover, and that the burden of proof on all these propositions was on the plaintiff.'

The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions: 'If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense.'

'If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover, and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe, that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe, that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant.'

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C. J., for the court. — This is an action of trespass, vi et armis, brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law, by which this action would abate by the death of either party, is reversed in this commonwealth by statute, which provides that actions of trespass for assault and battery shall survive. Rev. Sts. c. 93, § 7.

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term ' unintentional ' rather than involuntary, because in some of the cases it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass vi et armis lies; if consequential only, and not immediate, case is the proper remedy. Leame *v.* Bray, 3 East, 593; Hugget *v.* Montgomery, 2 N. R. 446, Day's Ed. and notes.

In these discussions it is frequently stated by judges, that when one receives injury from the direct act of another,

trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These dicta are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, nor careless. In the principal case cited, Leame *v.* Bray, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent if not unlawful. In the course of the argument of that case (p. 595), Lawrence, J., said: 'There certainly are cases in the books, where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional.' The term 'injury' implies something more than damage; but, independently of that consideration, the proposition may be true, because though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597), 'No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not.' But he immediately adds, 'Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass;' showing what he understood by a case not wilful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85 to 92; Wakeman *v.* Robinson, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely acci-

dental arises, no action can be supported for an injury arising therefrom. Davis *v.* Saunders, 2 Chit. R. 639; Com. Dig. Battery, A. (Day's Ed.) and notes; Vincent *v.* Stinehour, 7 Verm. 69. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act,

using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev. § 85; Powers *v.* Russell, 13 Pick. 69, 76; Tourtellot *v.* Rosebrook, 11 Met. 460.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the

context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover. *New trial ordered.*

DREW *v.* COMSTOCK.

Supreme Court of Michigan, July, 1885. 57 Mich. 176.

The owner of land may use force to remove a person coming thereon against the owner's will, unless the person can justify his entry.

The case is stated in the opinion of the court.

CAMPBELL, J., for the court. — Drew recovered $633 damages against defendant for assault and battery. Defendant brings error. The circumstances, so far as they are not disputed, were these: Defendant became owner of property

in Big Rapids, that had been mill property, lying west of the Grand Rapids & Indiana Railroad. This was once owned by one Moon, and while he so owned it a spur track had been taken from a side track, connected by switch with the main track, so as to lead from the mill to the side track and thence out upon the main road, and with no other means of egress. This spur had been so built that one of the rails was on Moon's land, and it was built to accommodate the mill, but was used more or less to back cars on. It was built in 1873. In the mean time it had become dilapidated and the ties had rotted, so that at the time of this difficulty it was unfit for use without repair.

Plaintiff bought the property in 1880, and in the spring of 1881 went on to build a mill, which he got ready for use in October, 1881. There was a siding of the Detroit & Lansing Railroad which connected with his mill premises, and over which he shipped lumber. The siding was so near the spur that cars upon the latter would interfere with those on the siding. Defendant had desired the Grand Rapids & Indiana Railroad to remove the spur from his land, and some preparation had been made to do so. On the evening of the 12th of October, 1881, plaintiff, who was section foreman of track repairing for the Grand Rapids & Indiana Railroad, spiked down the switch from the spur to the side track of that road, to prevent any use of it, and had some talk with defendant, and from that or other means understood that he did not desire the spur to be used or to remain on his land.

On the 13th of October, in the morning, plaintiff came with a gang of men, and proceeded to renew the spur track by taking out the old ties and putting in new and sound ones throughout. Defendant forbade his doing so, and he persisted. After coming twice and ordering plaintiff off, with his reasons for doing so, plaintiff still insisting that he would refit the track, defendant came a third time and pointed out his line and insisted it should not be trespassed on.

At this point the controversy begins. It is claimed by plaintiff that defendant pushed him off, and before he could entirely recover himself struck him over the forehead with a stick, and wounded him over the eye, so that he was struck down; and that this wound was a permanent injury of a serious character. Defendant claims that the stick was a sawed-off broom-handle that he had picked up in his mill to use as a staff, as he had been lamed; and that he struck to ward off an apparent effort by plaintiff to strike him with an uplifted shovel, and did not aim to do him injury, but the stick glanced and hit him as it fell. The stick was described by plaintiff as a hard-wood stick about four feet long. It appears to have been used with only one hand. When it was used, defendant's left side was nearest plaintiff, who claims he turned round to face him. The blow fell on the further side of plaintiff's forehead, immediately over his left eye. It was evidently struck by the rough end of the stick, as the wound, as described by Dr. Hendryk, the physician who dressed it, was only a flesh wound, less than an inch in length, which bled very freely, but involved no injury to either bone or periosteum, which had no complications in healing, and which he did not regard as a permanent injury.

It appears from the record that the case became greatly magnified by some extraneous matters, and there was much in the course of the trial which the court evidently regarded as of doubtful propriety and let in with some hesitation. We shall however confine ourselves to such questions as arose upon the charge, as we can hardly believe that a new trial will be allowed to be affected by the exaggerations which seem to have made out of what no physician has deemed a very serious wound a murderous injury.

The whole case, so far as the alleged assault is concerned, involved but a few questions. It is not disputed, and the court held, that the plaintiff was actually intruding and trespassing on defendant's ground, with a design of permanent occupancy. But the court also held that defendant

had no right to use any degree of force to keep off the trespassers, if the railroad company, under whom plaintiff had to justify, claimed rights there. And the court held that there was evidence of such a bona fide claim, and further that if defendant had no right to push plaintiff in the first instance he was in fault in striking the blow and must pay compensatory damages. He also referred several times to the claim of damages of $5000 in the declaration as the only absolute limit to the jury's discretion, and made a further statement in these words: 'A verdict in this case must cover all time. Mr. Drew can never sue again for any damage, no matter if he was prostrated on his bed during his lifetime after this from the effects of it. One action is all that can be brought in that case.' The earlier part of the charge practically compelled the jury to find some damages.

Some other portions of the charge are complained of, but as they mostly bear upon what is raised by these rulings, we need not consider them separately.

In opening the summing-up, after referring to the case as one of great importance because of the large claim of damages, the court told the jury there was no dispute 'as to the fact that an assault and battery was committed, and the time when it was committed, and the person by whom and upon whom the injury was committed.' An assault was then defined as involving an attempt 'with unlawful force' to inflict bodily injury, and a battery as an actual injury, which in this case was a real one. And in the same connection the jury were told, as they were afterwards told, that they had entire discretion as to damages within the sum claimed in the declaration.

When the jury were told that defendant had committed an assault and battery, and that every assault and battery was a use of unlawful force, they were practically told to find for the plaintiff, and give discretionary damages; and when they had their attention subsequently called to the fact that plaintiff could never sue again, although he might

be prostrated on his bed during his whole lifetime, they were authorized to act on the theory that the injury might produce future and permanent mischief not yet developed, and might assess their damages on that possibility. All of this was erroneous. There was a dispute whether the blow was aimed at all against plaintiff's safety, or directly against his person. The whole body of the controversy bore upon its legality; and there was no testimony whatever which tended to show that all the effects of the wound were not already developed or the wound not entirely healed without danger of reopening.

If an assault is always unlawful, then it was not admitted by defendant that he had committed one. But the definition is incorrect. An assault may be entirely lawful, as either excusable or justifiable, and it involves every 'attempt' or offer, with force and violence, to do corporal hurt to another. Toml. Law Dict. 'Assault.' The jury therefore were misled in the outset into an assumption which, from the peculiar amount of the verdict, does not seem to have been corrected. And while there are in subsequent instructions some explanations which bear in another direction, they were so qualified as to leave room to the end for the original impression.

Upon the question of the original trespass it appears by plaintiff's own showing that he knew defendant disputed the right of the company. He could not justify his own entry unless the company could do so, as he did not enter in his own right. We find nothing in the record which tends to show either that the company was in ignorance of the exact condition of the title or that it claimed any adverse holding. So far as there is any evidence at all, it bears in the other direction. It appears, without any contradictory evidence that we have discovered, that the only persons who had any right to act for the railroad proposed to respect defendant's claim. It would be unjust to the corporation to attribute to it a design which was unlawful, without proof that some responsible agent was engaged in it. Plaintiff, according to his own statement, communicated with no one

but an assistant roadmaster and a master of transportation, neither of whom can be presumed to have authority to represent the company in claiming disputed titles, and he also says that he proposed to go forward on his own responsibility without reference to their orders.

Under such circumstances it is difficult to see where there is any room for justification shown, or for holding him to be anything but a trespasser on his own responsibility. And it cannot be questioned that the entry of plaintiff and his gang of men to relay the track, if tortious at all, in spite of any opposition by defendant, was a very serious wrong[1] directly calculated to provoke violence.

There was nothing in the push asserted to have been given in the first place to amount to a wrongful assault on a trespasser, or to justify force on the part of the plaintiff. And if defendant used his stick to defend himself from what seemed to him to be an assault, there was no wrong in doing so. And if the act of plaintiff was such as appeared to involve serious bodily harm or peril to his life, we are not prepared to say that he would be deprived of his right of self-defence by even a technical unlawful assault which did no damage.

All these considerations were in the case, and upon any theory of the conduct of the parties the instructions went too far. Passing any other grounds of error as unnecessary to be dealt with, the judgment must for these be reversed with costs and a *New trial granted.*

[1] To enter 'with a strong hand or a multitude of people,' that is, to make forcible entry was made a criminal offence as long ago as 1381, and such it is generally in this country.

SCRIBNER *v.* BEACH.

Supreme Court of New York, 1847. 4 Denio, 448.

One should not, in self defence, use more force to repel the attack than is reasonably necessary.

Trespass for assault and battery. Plea, not guilty, with notice of 'son assault demesne,' and that the assault was committed in defence of defendant's property.

It appeared that the affair which gave rise to the action happened in August, 1842, on a piece of land in Catskill, of which the defendant had been in possession about three years before. He removed to Herkimer county, and the plaintiff succeeded to the occupancy of the land, and had burned a coal-pit upon it, and was engaged in taking the coal to market. While he was absent for that purpose, the defendant came to the pit and began to take out the coal with a rake he found there, having a wagon in readiness to take the coal away. While thus engaged the plaintiff came there and asked the defendant what he was doing. Defendant said if he came there he would show him. Upon this the plaintiff took hold of the rake with a view of taking it from the defendant, who, letting go with one hand, knocked the plaintiff down. As he arose he again took hold of the rake, but the defendant pulled it away, and aimed a blow with it at the plaintiff's head, which the latter sought to stop by putting up his hand. The rake struck his arm near the wrist and broke the bone.

The defendant offered to show that he had title to the land upon which the coal-pit was burned, which was uncultivated and unimproved; and that the coal was made from his wood cut upon the land. The plaintiff's counsel objected to this evidence, and the objection was sustained.

Verdict for the plaintiff for $150. The defendant moves for a new trial.

Jewett, J., for the court. — Self-defence is a primary law of nature, and it is held an excuse for breaches of the peace and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defence, prevention, or recovery, so as to become vindictive; for then the defender would himself become the aggressor. The force used must not exceed the necessity of the case. Elliott *v.* Brown, 2 Wend. 497; Gates *v.* Lounsbury, 20 Johns. 427; Gregory *v.* Hill, 8 T. R. 299; Baldwin *v.* Hayden, 6 Conn. 453; 3 Black. Com. 3–5; 1 Hawk. P. C. 130; Cockcroft *v.* Smith, 2 Salk. 642; Curtis *v.* Carson, 2 N. H. 539.

A man may justify an assault and battery in defence of his lands or goods, or of the goods of another delivered to him to be kept. Hawk. P. C. b. 1, c. 60, § 23; Seaman *v.* Cuppledick, Owen, 150. But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and if he refuses he should gently lay his hands on him for the purpose of removing him, and if he resist with force then force sufficient to expel him may be used in return by the owner. Weaver *v.* Bush, 8 T. R. 78; Buller's N. P. 19; 1 East, P. C. 406. It is otherwise if the trespasser enter the close with force; in that case the owner may without previous request to depart or desist use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose only of subduing his violence.

'A civil trespass,' says Holroyd, J., 'will not justify the firing a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters the dwelling-house of another. But a man is not authorized

to fire a pistol on every invasion or intrusion into his house; he ought, if he has a reasonable opportunity, to endeavor to remove the trespasser without having recourse to the last extremity.' Mead's Case, 1 Lewis, C. C. 185; Roscoe's C. Ev. 262. The rule is, that in all cases of resistance to trespassers, the party resisting will be guilty of an assault and battery if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a known felony upon a man's person (as to rob or murder, or to commit a rape upon a woman) or upon a man's habitation or property (as arson or burglary), the person assaulted may repel force by force; and even his servant, then attendant on him, or any other person present, may interpose for preventing mischief; and in the latter case the owner, or any part of his family, or even a lodger with him, may kill the assailant, for preventing the mischief. Foster's Crown Law, 273.

The resumption of the possession of land and houses by the mere act of the party is frequently allowed. Thus a person having a right to the possession of lands, may enter by force, and turn out a person who has a mere naked possession, and cannot be made answerable in damages to a party who has no right and is himself a tortfeasor. Although if the entry in such case be with a strong hand or a multitude of people, it is an offence for which the party entering must answer criminally. Hyatt *v.* Wood, 4 Johns. 150; Sampson *v.* Henry, 13 Pick. 36.[1]

In respect to personal property the right of recaption exists, with the caution that it be not exercised violently or by breach of the peace; for should these accompany the act, the party would then be answerable criminally. But the riot, or force, would not confer a right on a person who had none; nor would they subject the owner of the chattel to a restoration of it to one who was not the owner. Hyatt *v.* Wood, supra. In the case of personal property improperly

[1] See Torts (Student's Series), 194.

detained or taken away it may be taken from the house and custody of the wrongdoer even without a previous request, but unless it was seized or attempted to be seized forcibly, the owner cannot justify doing anything more than gently laying his hands on the wrongdoer to recover it. Weaver *v.* Bush, supra; Com. Dig. Pleader, 3, M. 17; Spencer *v.* McGowen, 13 Wend. 256.

In one branch of the defence the defendant set up 'son assault demesne.' That was overthrown by evidence showing a manifest disproportion between the battery given and the first assault. Even a wounding was proved. The defendant also relied upon a defence of his possession of certain personal property, which he insisted was invaded by the plaintiff, and in the defence of which he committed the assault. To sustain this defence he proposed to prove that the coal-pit was on new and unimproved land to which he had title, and that the wood from which the coal was made was cut from this land without any authority from him; but this evidence was rejected. The object of strife between the parties was the possession of the rake, not the coal. The plaintiff is not shown to have committed a single act tending to disturb the defendant in his possession of the latter. The ownership of the coal therefore was not a material fact. But admitting that the defendant had a legal title to the coal, and that the plaintiff's object in regaining possession of the rake was to use it as a means of retaking the possession of the coal, still the defendant could not justify the *wounding* merely in defence of his possession. Gregory *v.* Hill, supra. Unless the plaintiff first attempted forcibly to take the coal, of which there was no proof, I think the evidence was immaterial, and was properly overruled. *New trial denied.*

FALSE IMPRISONMENT.

BIRD *v.* JONES.

Queen's Bench of England, 1845. 7 Q. B. 742.

To constitute an imprisonment there must be a total restraint of freedom of passing.

VERDICT for the plaintiff in an action for false imprisonment, and rule nisi for a new trial. The judgments explain the nature of the case. *Cur. adv. vult.*

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed; and I shall be able to do so very briefly because, having had the opportunity of reading a judgment prepared by my brother Patteson, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn and with regard to which our difference exists.

This point is whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows: —

A part of a public highway was inclosed and appropriated for spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but after a struggle, during which no momentary detention of his person took place, he

succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and during that time remained where he had thus placed himself.

These are the facts; and setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom indeed no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction at his free will and pleasure; and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment neither more nor less from their being wrongful or capable of justification.

And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible or, though real, still in conception only; it may itself be movable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion

seems to me to arise from confounding imprisonment of the body with mere loss of freedom. It is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. Imprisonment (G) it is said: 'Every restraint of the liberty of a free man will be an imprisonment.' For this the authorities cited are 2 Inst. 482; Cro. Car. 210 (a). But when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the statute of Westminster 2d,[1] 'in prisona,' and says, 'every restraint of the liberty of a free man is an imprisonment although he be not within the walls of any common prison.' The passage in Cro. Car.[2] is from a curious case of an information against Sir Miles Hobert and Mr. Stroud for escaping out of the Gate House Prison, to which they had been committed by the King. The question was whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favor of the keeper, these gentlemen had not, except on one occasion, ever been withir the walls of the Gate House. The occasion is somewhat singularly expressed in the decision of the court, which was 'that their *voluntary* retirement to the close stool' in the Gate House 'made them to be prisoners.' Theresolution however in question is this; 'that the prison of the King's Bench is not any local prison confined only to one place, and that *every place* where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison.'

On a case of this sort, which if there be difficulty in it is

[1] 1 Stat. 13 Edw. I, c. 48.

[2] Hobert & Stroud's Case, Cro. Car. 209.

at least purely elementary, it is not easy nor necessary to enlarge; and I am unwilling to put any extreme case hypothetically. But I wish to meet one suggestion which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of a right of way into an imprisonment, the answer is, that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison, and yet as obviously none would be confined to it.

Knowing that my lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own; but if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

Williams, J. — . . . A part of Hammersmith Bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence. The defendant (clerk of the Bridge Company) pulled him back; but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway in the direction he wished to go. The plaintiff

however was at the same time told that he might go back into the carriage way and proceed to the other side of the bridge if he pleased. The plaintiff refused to do so, and remained where he was so obstructed about half an hour.

And if a partial restraint of the will be sufficient to constitute an imprisonment, such undoubtedly took place. He wished to go in a particular direction, and was prevented; but at the same time another course was open to him. About the meaning of the word imprisonment, and the definitions of it usually given, there is so little doubt that any difference of opinion is scarcely possible. Certainly, so far as I am aware, none such exists upon the present occasion. The difficulty, whatever it be, arises when the general rule is applied to the facts of a particular case.

'Every confinement of the person' (according to Blackstone[1]) 'is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets,' which perhaps may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke, in his second Institute,[2] speaks of 'a prison in law' and 'a prison in deed;' so that there may be a constructive as well as an actual imprisonment; and therefore it may be admitted that personal violence need not be used in order to amount to it. 'If the bailiff' (as the case is put in Bull. N. P. 62) 'who has a process against one, says to him, "You are my prisoner — I have a writ against you," upon which he submits, turns back or goes with him, though the bailiff never touched him yet it is an arrest, because he submitted to the process.' So if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment though no actual violence be used.

In such cases, however, though little may be said, much

[1] 3 Black. Com. 127.

[2] 2 Inst. 589.

is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one direction prescribed to him than if the constable or bailiff had actually hold of him; no return or deviation from the course prescribed is open to him. And it is that *entire* restraint upon the will which, I apprehend, constitutes the imprisonment. In the passage cited from Buller's Nisi Prius it is remarked that, if the party addressed by the bailiff, instead of complying, had run away, it could be no arrest unless the bailiff actually laid hold of him, and for obvious reasons. Suppose (and the supposition is perhaps objectionable as only putting the case before us over again) any person to erect an obstruction across a public passage in a town, and another, who had a right of passage, to be refused permission by the party obstructing, and after some delay to be compelled to return and take another and circuitous route to his place of destination; I do not think that, during such detention, such person was under imprisonment or could maintain an action for false imprisonment, whatever other remedy might be open to him.

I am desirous only to illustrate my meaning and explain the reason why I consider the imprisonment in this case not to be complete. The reason shortly is, that I am aware of no case, nor of any definition, which warrants the supposition of a man being imprisoned during the time that an escape is open to him if he chooses to avail himself of it.

Patteson, J. — . . . I have no doubt that in general if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree also that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal

violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong undoubtedly if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if on the party persisting in going in that drection he touched his person or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring him. . . .

Lord Denman, C. J., gave a dissenting opinion.

Rule absolute.

WEST *v.* SMALLWOOD.

Court of Exchequer, Easter Term, 1838. 3 Mees. & W. 418.

Where a party lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate grants a warrant, upon which the party charged is arrested, the party laying the complaint is not liable as a trespasser, although the particular case be one in which the magistrate had no authority to act.

Trespass for assault and false imprisonment. Plea, the general issue.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after Hilary Term, it appeared that the plaintiff was a builder, and had been employed by the defendant to build some houses for him under a specific contract. Whilst the work was going on a dispute arose between the plaintiff and defendant, and the plaintiff in consequence discontinued the work, upon which the defendant went before a magistrate and laid an information against him, under the Master and Servant's Act, 4 Geo. 4, c. 34, § 3. The magistrate having granted a warrant, the defendant accompanied the constable

who had the execution of it, and pointed out the plaintiff to him. Upon being brought before the magistrate, the complaint was heard and dismissed. Lord Abinger, C. B., was of opinion that the action was misconceived, and should have been in case; and thought that the evidence of interference in the arrest by the defendant was too slight to make him a trespasser; and the plaintiff's counsel not having pressed his lordship to lay that question before the jury, the plaintiff was nonsuited. Motion that the nonsuit be set aside and new trial granted.

Lord Abinger, C. B. — Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate acting without any jurisdiction at all is liable as a trespasser in many cases, but this liability does not extend to the constable, who acts under a warrant, and the statute 24 Geo. 2, c. 44, was passed with this very object of protecting such officers. As to the other part of the case, I do not deny that the fact of the defendant's presence when the plaintiff was taken, and his pointing him out to the constable, might make it a case to go to the jury, but that was not pressed on the part of the plaintiff.

Bolland, B. — I am of the same opinion, and for the same reasons. With regard to the case of the sheriff, that is clearly distinguishable from the present, because the party puts the sheriff in motion, and the latter acts in obedience to him. In the case of an act done by a magistrate, the complainant does no more than lay before a court of competent jurisdiction the grounds on which he seeks redress, and the magistrate, erroneously thinking that he has author-

ity, grants a warrant. As to the subsequent conduct of the defendant, all he does is to point the plaintiff out to the constable as the person named in the warrant; but this does not amount to any active interference. If any malice could be shown, it might have formed the ground of an action on the case.

ALDERSON, B.— As to the first point, the party must be taken to have merely laid his case before the magistrate, who thereupon granted a warrant adapted to the complaint. Then, what has been done by the defendant to make him liable as a trespasser? He would be liable only in case, if he was actuated in what he did by malice. Then comes the second question; and I agree in the doctrine, that if the defendant took an active part with the constable in apprehending the plaintiff, he must have failed on the state of these pleadings, because it would have been incumbent on him to show that he had a right so to do, which he could only have done under a special plea, and could not do under the general issue. But all that the defendant did in this instance was to point out to the constable the party who was to be arrested. And though undoubtedly that was evidence for the jury, yet where counsel submits to the view taken of the evidence by the judge at nisi prius, and does not claim to have it left to the jury, I think we ought not to interfere. *Rule refused.*

SAVACOOL *v.* BOUGHTON.

Supreme Court of New York, July, 1830. 5 Wend. 170.

A ministerial officer is protected in the execution of process, whether the same issue from a court of limited or general jurisdiction, although such court have not in fact jurisdiction in the case, provided that on the face of the process it appears that the court has jurisdiction of the subject-matter, and nothing appears in the same to apprise the officer but that the court also has jurisdiction of the *person* of the party to be affected by the process.

Demurrer to replication. The plaintiff declared in trespass for an assault, battery, and false imprisonment. The defendant pleaded, 1. The general issue; 2. A justification, for that he as a constable, by virtue of an execution issued by a justice of the peace, on a judgment rendered against the plaintiff in assumpsit for $7.38, arrested the plaintiff and committed him to jail; and, 3. A similar justification, setting forth the judgment. The plaintiff replied to the second and third pleas precludi non, because, previous to the rendition of the judgment set forth by the defendant, the justice who rendered the same did not issue any process for the appearance of him (the plaintiff) in the suit in which the judgment was rendered, and that he (the plaintiff) did not direct or authorize the justice to enter a judgment by confession in favor of the plaintiffs in the suit, against him (the plaintiff in this cause), nor did the parties in the said suit appear before the justice and join issue, pursuant to the provisions of the $50 Act; and this, &c., wherefore, &c. To this replication the defendant demurred, and the plaintiff joined in demurrer.

Marcy, J., for the court. — What an officer is required to show to justify himself in the execution of process is not very clearly settled. There is considerable contrariety of

authority on the subject. Where it appears on the face of the process that the court or magistrate that issued it had not jurisdiction of the subject-matter of the suit, or of the person of the party against whom it is directed, it is void, not only as respects the court or magistrate and the party at whose instance it is sued out, but it affords no protection to the officer who has acted under it.

Where the court issuing the process has general jurisdiction, and the process is regular on its face, the officer is not, though the party may be, affected by an irregularity in the proceedings. Where a judgment is vacated for an irregularity, the party is liable for the acts done under it; but the officer has a protection by reason of his regular writ. 1 Lev. 95; 1 Sid. 272; 1 Strange, 509.

More strictness has been required in justifying under process of courts of limited jurisdiction. Many cases may be found wherein it is stated generally that when an inferior court exceeds its jurisdiction, its proceedings are entirely void, and afford no protection to the court, the party, or the officer who has executed its process.

This proposition is undoubtedly true in its largest sense where the proceedings are coram non judice, and the process by which the officer seeks to make out his justification shows that the court had not jurisdiction; but I apprehend that it should be qualified where the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause. A court may have jurisdiction of the subject-matter, but not of the person of the parties. If it does not acquire the latter, its proceedings derive no validity from the former. A justice of the peace who should give judgment against a person on a promissory note under $50, without having issued process of any kind against him, or taken his confession, or without his voluntary appearance in court, would exceed his jurisdiction and be responsible to the party injured; so would the party who procured the court to exceed its authority. But would the officer to whom an execution on this judgment had

been issued be liable for acts done in obedience to it, if nothing appeared to show that the justice had not jurisdiction of the defendant's person? This is the question presented by the demurrer in this case.

A distinction has long existed in cases of this kind, between the court which exceeds its jurisdiction and the party at whose instance it takes place, and a mere ministerial officer who executes the process issued without authority. This prevails, as we have seen, where a judgment has been obtained in a court of general jurisdiction which is subsequently set aside for irregularity. The officer has a protection that the party has not, and that, whether the court from which the process issues is a court of general or limited jurisdiction. The right of a mere ministerial officer to justify under his process where the court or party cannot, was considered, but not settled, in the case of Smith *v.* Bouchier and Others, decided in 1734. This case is found in 2 Strange, 993; 2 Barnard. 331; Cunn. 89, 127; Cases temp. Hardwicke, 62; 2 Kelyn. 144, pl. 123. The reports agree as to the facts, but not as to some points in the opinion of the court. Process was issued from the chancellor's court of Oxford against Smith, who was arrested and committed to jail. The proceedings were instituted without proving what was requisite to give the court jurisdiction. The plaintiff who procured the proceedings, the vice-chancellor who held the court, and the officers who executed the process, were all sued by the defendant Smith for false imprisonment. They united in their plea of justification, and were all pronounced guilty. Sir John Strange makes the court say that some of the defendants, namely, the officer and jailer, might have been excused if they had justified without the plaintiff and vice-chancellor. The Court of Common Pleas in England, in their opinion in the case of Perkin *v.* Proctor and Green, 2 Wilson, 382, say that Lord Hardwicke denied that such could have been the case. It appears from the case, as reported in Hardwicke's Cases, 69, that the point of the officer's liability was not settled; for it is there said

that there was no need of giving a distinct opinion as to the action lying against them.

In Hill *v.* Bateman, 2 Strange, 710, the distinction in favor of the officer is clearly taken. The plaintiff had been fined under the game laws, and was immediately sent to bridewell, without any attempt to levy the penalty upon his goods. This the justice had not a right to do, and was held liable for the imprisonment; but the constable was justified, because the matter was within the jurisdiction of the justice. I understand by this case that the justice had not authority, or, in other words, had not jurisdiction, to issue process to commit the party until he had attempted to levy the fine upon his goods; but that after he had made that attempt without success, he had authority to commit him. The process, though unauthorized by the circumstances of the case, would, under other circumstances, have been proper. The issuing of the process was a matter within the justice's jurisdiction. This was enough for the officer's justification. It is further said in this case, if the justice makes a warrant which is plainly out of his jurisdiction, it is no justification. This I understand to mean a warrant which appears on its face to be such as the justice could in no case issue.

The views I have of this case are confirmed by that of Shergold *v.* Holloway, 2 Strange, 1002. There the justice issued a warrant on a complaint for not paying wages, and the defendant, a constable, arrested Shergold on it. He was sued for this arrest. The court said the justice had no authority in any instance to proceed by warrant, a summons being the only process. The constable could not therefore justify; he was presumed to know that under no circumstances could a warrant be issued in such a case; therefore the court say there was 'no pretence for such a justification.' This decision would doubtless have been different if it had appeared that under any state of things a proceeding by warrant was allowable in such a case; for then the court would assume for the officer's protection that such a

state of things did exist, or, at least, he should not be required to judge whether it did or not. His duty and his protection both depend upon the assumption that the justice had determined correctly, that those circumstances had happened which called for a warrant, if under any circumstances a warrant could issue. In the case of Moravia *v.* Sloper, Willes, 30, the same distinction which has been noticed in the cases before referred to is still more distinctly put forth. It is there said that 'though in case of an officer who is obliged to obey the process of the court, and is punishable if he does not, it may not be necessary to set forth that the cause of action arose within the jurisdiction of the court; it has always been holden, except in one case (the correctness of which C. J. Willes controverted in another part of his opinion), and we are all clearly of opinion that it is necessary in the case of a plaintiff himself.'

Lord Kenyon says, in the case of The King *v.* Danser, 6 T. R. 242, 'A distinction indeed has been made with respect to the persons against whom an action may be brought for taking the defendant's goods in execution by virtue of the process of an inferior court, where the cause of action does not arise within its jurisdiction; the *plaintiff* in the cause being considered a trespasser, but not the *officer* of the court.' A court of admiralty, I apprehend, will not be considered a court of general jurisdiction. In relation to its proceedings, Buller, J., says, in the case of Ladbroke *v.* Crickett, 2 T. R. 653, if upon their face 'the court had jurisdiction, the officer was bound to execute the process, and could not examine into the foundation of them; and that will protect him.'

There are several cases in our own Reports which are supposed to militate against the distinction recognized in the foregoing cases; I apprehend, however, that most of them may be reconciled with those decisions which support it. The decision in the case of Borden *v.* Fitch, 15 Johns. R. 121, was, that a court must not only have jurisdiction of the subject-matter, but of the person of the parties, to render

its proceedings valid; and if it has not jurisdiction of the person, its proceedings are absolutely void. It will be recollected that the person who wished to avail himself of the proceedings of the court whose jurisdiction was impeached, was a party to them. There was no occasion or opportunity afforded by that case of considering the question involved in this, the liability of the officer, who, as a minister of the court, has executed its process issued on such proceedings.

The case of Cable *v.* Cooper, 15 Johns. R. 152, deserves a more minute consideration. One Brown was committed on a ca. sa. to the custody of the defendant, who was sheriff of Oneida County, and discharged by a Supreme Court commissioner under the habeas corpus act. The defendant, when prosecuted for the escape of Brown, offered to justify by showing the discharge; but a majority of the court decided that the proceedings under the habeas corpus Act before the commissioner were coram non judice, and therefore void. The principle of this decision is, that the power to discharge under that act does not apply to the case of a prisoner who 'is *convict or in execution by legal process.*' Brown was in execution by legal process, and this was well known to the defendant, for he had the ca. sa., and held the prisoner. Whatever appeared upon the face of the discharge, he knew, if he rightly understood the powers of the commissioner, it was no authority for him to release Brown. If the discharge did not relate to the imprisonment on the ca. sa., it was certainly no authority to release him from confinement thereon; and if it did relate to that imprisonment, then it showed on its face a want of jurisdiction in the officer who granted it; for he could not discharge a person in execution by legal process. Again, the sheriff who held the prisoner might well be regarded as a party to the proceeding before the commissioner for the discharge; for the habeas corpus must have been directed to him, and his return thereto showed the true cause of Brown's detention.

The cases of Smith *v.* Shaw, 12 Johns. R. 257, and Suy-

dam and Wyckoff *v.* Keys, 13 ib. 444, have a tendency to obliterate, or at least confound, the distinction which the other cases seem to me to raise in favor of the officer. I am free to confess that the reasoning and conclusion of the judge who delivered the dissenting opinion in the former case are more satisfactory to me than those contained in the opinion adopted by a majority of the court. Smith, in that case, was not looked upon in the light of a mere ministerial officer. He was superior in authority to Hopkins and Findley, who had illegally imprisoned the plaintiff; and his liability was put expressly upon the ground that he had ratified and confirmed their acts, and exercised other restraint over the plaintiff than merely continuing the original imprisonment. If he had only refused to discharge the prisoner, he would not, as is strongly intimated by the court, have been held liable. This case was not considered by the court as presenting the question which arises in the one now before us, and therefore it can afford but little authority to guide our present determination.

It seems to me somewhat difficult to reconcile the decision in the case of Suydam and Wyckoff *v.* Keys, with the doctrine I am endeavoring to establish, or with the principles of some other cases which have been decided here. The defendant was a collector of a tax which had been voted by a school district in Orange County, and assessed by the trustees. They had authority to assess, but were confined in their assessments to the *resident inhabitants* of the district. The plaintiffs, having property in the district, but actually resident in New York, were included among the persons assessed, and designated on the warrant issued to the defendant as *inhabitants of the district.* He took their property by virtue of this warrant, and was held liable in an action of trespass. It appears to me the defendant, acting merely as a ministerial officer, should have been allowed the protection of his warrant, which did not show upon the face of it an excess or want of jurisdiction in the trustees. I cannot distinguish this case from a whole class

of cases, beginning with the earliest reports and coming down to this, holding that such a warrant is a protection to the officer executing it, unless it is to be distinguished from cases otherwise similar, by the fact that the want of jurisdiction in the trustees to make the assessment on the plaintiffs was to be presumed to be within the knowledge of the officer, and that he was bound to act on this knowledge, in opposition to the statements of his warrant. The decision, however, is not put on such ground, but upon the broad principle that the officer must see that he acts within the scope of the legal powers of those who commanded him. This principle requires a ministerial officer to look beyond his precept, and examine into extrinsic facts beyond the fact of jurisdiction of the subject-matter generally, or under certain circumstances. Such, I apprehend, was not the doctrine applied to the case of Warner *v.* Shed, 10 Johns. R. 138. There the officer was justified by his process, as that showed the justice's jurisdiction of the subject-matter. 'He was not bound,' the court say, 'to examine into the validity of the proceedings and of the process.' The collector's warrant in the former case, as well as the constable's mittimus in the latter, showed jurisdiction of the subject-matter in the officers issuing the process. In the former case it appeared upon the face of the process that the plaintiffs were resident inhabitants, and as such they were liable to be assessed; and I should think that the collector was no more bound to examine into the fact of residence which had been passed on by the trustees, than the constable was to look into the proceedings of the special sessions under whose authority he acted.

I find still greater difficulty in reconciling the case of Suydam and Wyckoff *v.* Keys with that of Beach *v.* Furman, 9 Johns. R. 229. The court assume, though they do not directly decide, that Sarah Furman was not, by reason of being a female, liable to be assessed to work on the highways; yet they held that the justice who issued, at the instance of the overseer of the highways, the warrant on

which her property was taken and sold for this illegal assessment, and the constable who executed it, both protected, because they acted ministerially and in obedience to the commissioners and overseer of highways, who had jurisdiction over the subject-matter, the assessment of highway labor. Let us compare this case with that of Suydam and Wyckoff *v.* Keys, and see if they can stand together. The commissioners had jurisdiction of the subject-matter, the assessment of labor. The trustees had jurisdiction of the subject-matter, the assessment of a district tax. The commissioners assessed a person who, by reason of her sex, was not liable to be assessed, as the court in giving their opinion conceded. The trustees assess persons who, by reason of their residence out of the district, were not liable to be assessed; the justice and constable who enforce the commissioner's assessment, by taking the property of the person illegally assessed, are protected; the constable who enforces the illegal assessment of the trustees, by taking the property of the persons illegally assessed, is held liable as a trespasser. I think these cases cannot well stand together, and if one must be given up, I do not hesitate to say it should be Suydam and Wyckoff *v.* Keys.

The remark of this court in the case of Gold *v.* Bissell, 1 Wendell, 213, 'that where a warrant cannot legally issue without oath, but is so issued, all the parties concerned in the arrest under such process are trespassers,' was not intended, I presume, to apply to an officer who had no knowledge, from the warrant or otherwise, that it had not been duly sued out. A remark somewhat similar is made by Trimble, J., in Elliott *v.* Peirsol, 1 Peters' U. S. Rep. 340; but the decision of that case did not call for any such distinction as is raised in the one now under consideration. I have felt that the case of Wise *v.* Withers, 3 Cranch, 331, is a direct authority against giving to the officer the protection that is now claimed for him. The plaintiff in that case was a magistrate in the District of Columbia, and, as such, not subject to do military duty. He was fined for neglect

of such duty, and a warrant for the collection of the fine issued to the defendant, who seized his property thereon; for this act he was prosecuted. The only point much considered in that case was that which involved the question as to the plaintiff's exemption from military duty; but that which related to the defendant's protection under his warrant was only glanced at in the argument of counsel and in the decision by the court. The distinction contended for in this case was scarcely raised there, and the attention of the court does not appear to have been drawn to a single case in which it has ever been noticed. The Chief Justice, in the opinion of the court, merely observes, that it is a principle that a decision of such a tribunal (a tribunal of limited jurisdiction), clearly *without* its jurisdiction, cannot protect the officer who executes it. I would, with deference, ask whether there is not an error in the application of the principle which the Chief Justice lays down to the case then before the court. He must mean, by a decision being clearly without the jurisdiction of the court, a sentence or judgment on a matter not within its cognizance. Was the subject-matter of that cause beyond the cognizance of a court-martial? It appears to me that it was not. The power and duty of the court was to punish and fine delinquents; consequently, it had jurisdiction over the subject-matter, but not over the person. There was nothing in the process which the ministerial officer executed to apprise him that the court had not jurisdiction of the *person*. It seems to me that it was not a case to which the principle laid down by the court was applicable; but it would have been such a case if there had been a want of jurisdiction over the subject-matter. I can scarcely consider, therefore, the determination of the Supreme Court of the United States in the case of Wise *v.* Withers a deliberate decision on the question now before us. If it was to be viewed in that light, we should be called upon, by the great learning and high character of that court, to hesitate long and examine carefully before we decided a point conflicting with such decision.

There is certainly high authority for the distinction which I am disposed to recognize in this case; and, in my judgment, the same principle which gives protection to a ministerial officer who executes the process of a court of *general* jurisdiction, should protect him when he executes the process of a court of *limited* jurisdiction, if the *subject-matter* of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the *person* was not also within it.

The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority: —

That where an inferior court has not jurisdiction of the subject-matter, or, having it, has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court nor the plaintiff (if he procured or assented to the proceedings) can derive any protection from them when prosecuted by a party aggrieved thereby.

If a mere ministerial officer executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it.

If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the *person* or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process. Bull. N. P. 83; Willes, 32, and the cases there cited by Lord Ch. J. Willes.

I am therefore of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution, not showing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him in virtue of that process.

Judgment on demurrer for the defendant, with leave to the plaintiff to amend his replication on payment of costs.

WILMARTH *v.* BURT.

Supreme Court of Massachusetts, October, 1843. 7 Met. 257.

An officer is not liable for arresting a defendant on execution issued by a court having jurisdiction, although the defendant shows his discharge in insolvency to the officer before he is arrested.

Two actions of trespass for assault, battery and false imprisonment. The defendant, a deputy sheriff, pleaded the general issue, and set forth, by way of defence, that the assault, &c. were committed by him in the execution of civil process, by arresting the defendants upon an execution duly issued against them from the Court of Common Pleas. At the trial, it was proved or admitted that, on the 9th of July, 1842, an execution, in the usual form, was issued against the plaintiffs jointly, as co-partners, upon a judgment in the Court of Common Pleas, recovered by E. W. Chaddock, on a contract made on the 2d of October, 1837; that this execution was returned unsatisfied, and that an alias, in the common form, was issued on the 18th of August, 1842, upon which the plaintiffs were arrested by the defendant, and committed to the jail in Taunton; that they immediately gave bond for the liberty of the jail limits, went at large, and never surrendered themselves.

It also appeared that the plaintiffs had taken the benefit of the insolvent law of this Commonwealth, and had obtained a discharge under it, in the usual form, dated March 6th, 1841, and that this discharge was exhibited to the defendant before he made the above-mentioned arrest and commitment. The defendant admitted that he had a bond of indemnity from the execution creditor, which he required before he would arrest the plaintiffs on the execution.

Upon these facts, the defendant's counsel requested the court to rule that the actions could not be maintained, because trespass will not lie against an officer for the execution of process regularly issued, wherein he is commanded to arrest the body of the party therein named as defendant; because the plaintiffs could and should have pleaded their discharge, during the pendency of the action against them, in which said Chaddock's judgment was recovered, and have caused the form of the execution to be varied, pursuant to the Rev. Sts. c. 97, §§ 10, 11, so as not to run against their bodies; and because the remedy of the plaintiffs, if they were unlawfully arrested, was by an application to a court for a discharge, by habeas corpus or otherwise. The judge, before the trial was had, refused this request, and instructed the jury, for the purpose of the trials, that the plaintiffs were entitled to recover; and a verdict was returned, in each case, for the plaintiff, subject to the opinion of the whole court.

Shaw, C. J., for the court. — These two cases depend on the same principle, and the decision of one settles both. Each is an action of trespass vi et armis for an assault and false imprisonment, and the trespass relied upon was the arrest of the plaintiff, on an execution, by the defendant, who was a deputy sheriff. The plaintiffs seek to avoid this justification, by showing that they had obtained a certificate of discharge, under the insolvent law of Massachusetts, which discharge was obtained long after the date of the contract on which the judgment was recovered, and that they exhibited their discharge to the defendant at the time of the arrest.

It does not distinctly appear, from the facts stated, whether the judgment, on which the above mentioned execution issued, was rendered before or after the date of the plaintiffs' discharge; but as the discharge was granted in March, 1841, and the first execution mentioned is stated to have been issued in June, 1842, there is ground to presume that

the judgment was rendered some time after the discharge. If such was the case, it would be very clear that the officer could take no notice of such a discharge; for two reasons: 1st. In the case supposed, the debtor, having his discharge before the rendition of judgment, had an opportunity to plead it by way of defence; and if he did not do so, it may be presumed that it was not valid. 2d. The judgment, being rendered after the discharge, might have been founded on a cause of action which accrued after the discharge; and the officer could not by possibility know that it was not so. If the decision depended on this question, it might be necessary to send the cause back, to have that fact more exactly ascertained. But we think the result must be the same, if the discharge was obtained after the rendition of the judgment.

The execution was in common form, authorizing and requiring the officer to take the property of the debtor, to satisfy the execution, and for want thereof, to arrest him. In making the arrest, therefore, he followed precisely the command of his precept. As a general rule, the officer is bound only to see that the process, which he is called upon to execute, is in due and regular form, and issues from a court having jurisdiction of the subject. In such case, he is justified in obeying his precept, and it is highly necessary to the due, prompt and energetic execution of the commands of the law, that he should be so. Fitzpatrick *v.* Kelly, cited 3 T. R. 740; Cameron *v.* Lightfoot, 2 W. Bl. 1190. 'It is incomprehensible,' says Lord Kenyon, in Belk *v.* Broadbent, 3 T. R. 185, 'to say that a person shall be considered as a trespasser who acts under the process of the court.' Tarlton *v.* Fisher, 2 Doug. 671, was trespass for assault and false imprisonment of a certificated bankrupt. Some doubt arose upon the express words of the statute, that such person 'shall not be liable to be arrested.' But it was held, that though the debtor might have a supersedeas to the execution, yet that till superseded, it was a justification; and even after supersedeas, though trespass would lie

against the party, it would not lie against the sheriff. And this is stated to be the settled practice. The inconvenience would be very great, if the law were otherwise.

And we think the same principle is well established by the authorities in our own books. Smith *v.* Bowker, 1 Mass. 76; Haskell *v.* Sumner, 1 Pick. 459. In Nichols *v.* Thomas, 4 Mass. 232, on an execution against a corporation styled the President, Directors and Company of a Turnpike, the officer arrested and committed one of the proprietors. There, indeed, he was held liable, because the plaintiff was not named nor described in his precept; the corporate name not being the description or designation of any natural person whatever. But Parsons, C. J., there affirms the general rule, and illustrates it by reference to an executor or administrator not liable to arrest. 'If,' says he, 'an execution should illegally issue against the body of an executor or administrator, on a judgment against the estate of the deceased, the officer might be justified in arresting the body of the executor or administrator, as he did not mistake his precept, which issued from a court having jurisdiction.' The same rule is recognized in Sanford *v.* Nichols, 13 Mass. 288, where Parker, C. J., says, 'it will not do to require of executive officers, before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of legal process.'

If the plaintiff in such case has any remedy, it is not against the officer, who has simply executed the regular precept of a court having jurisdiction, but by applying for his discharge out of custody, or by audita querela, or by an action on the case against the party who thus wrongfully armed the officer with power to arrest him, upon the ground of its being, on his part, a malicious arrest.

And the reason for adopting this valuable rule, in a case like the present, is very strong. It would paralyze the action of an officer, and often defeat the service of legal

process, if he were bound to stop and try the genuineness and validity of a certificate of discharge under a bankrupt or insolvent law. The certificate may not be genuine or legally authenticated, and yet the officer can take no evidence, nor even put the debtor himself under oath to prove it.

But further; suppose it be genuine, it is not an absolute discharge, or discharge from all debts, but only a discharge sub modo. Under the United States bankrupt law of 1841, it was held by Mr. Justice Story, that though, by the true construction of that law, the certificate, in certain cases, is not a discharge from fiduciary debts, yet that the certificate should be issued in general and unlimited terms, leaving the bankrupt to avail himself of it, so far as the law has made it an effective discharge. Matter of Tebbetts, 5 Law Reporter, 259.

So under our own insolvent law of 1838, c. 163, § 10, modified by subsequent acts, it is provided that if the insolvent shall have concealed his property, given preferences, or done other acts in fraud of the law, his discharge shall not be granted, or, *if granted, shall be of no effect.* Here then are cases, in which an insolvent or bankrupt may have his discharge in his pocket, and present it to the officer, in the amplest form of a full and complete discharge from all his debts, and yet, by operation of the law under which it is granted, it may be no discharge of the debt sought to be enforced by service of the execution. Is the officer to try all the questions of law and fact, involved in the question of the genuineness, the validity, and the application of the discharge to this particular debt? To hold that an officer would be liable in trespass, for executing the command of his precept, would be to hold that an executive officer must try all these questions, without power to summon a witness or hear the parties, and to decide the case correctly, upon peril of being liable for damages for false imprisonment.

The fact that the officer took an indemnity, can make no difference; it was to avail him only in case he had mistaken

in regard to his duty. But whether he had an indemnity or not, is of no importance to the plaintiff; it did not convert into a wrong an act which was itself right and justifiable.

Verdicts set aside, and plaintiffs nonsuit.

EVERETT *v.* HENDERSON.

Supreme Court of Massachusetts, January, 1888. 146 Mass. 89.

Process voidable for error, as for misrepresentation, does not subject the person who obtains it to an action even after it has been set aside.

Contract on a poor debtor's recognizance, entered into by the first-named defendant as principal, and by the other defendant as surety, and containing the usual conditions.

At the trial in the Superior Court, before Mason, J., it appeared that the plaintiff duly recovered judgment against Henderson in the Municipal Court of the city of Boston, on May 29, 1884, and that execution duly issued on the judgment, but was returned in no part satisfied, and without service. On September 3, 1884, an alias execution on the judgment duly issued, and on September 8, 1884, the plaintiff made an affidavit, in due form of law, before Edward J. Jones, a master in chancery, that he believed, and had good reasons to believe, that Henderson 'has property not exempt from being taken on execution, which he does not intend to apply to the payment' of the claim; and that Henderson 'contracted the debt with an intention not to pay the same.' Thereupon Jones, upon an ex parte hearing, granted a certificate 'that, after due hearing, I am satisfied there is reasonable cause to believe that the charge made in the said affidavit is true; and satisfactory cause having been shown, I hereby authorize the arrest of the said debtor on the annexed execution;' and annexed the affidavit and certificate to the alias execution.

On November 1, 1884, Henderson was arrested in Boston by an officer duly qualified to make the arrest and serve the execution, and carried before Edward J. Jenkins, a commissioner of insolvency, before whom he gave the recognizance.

On November 24, 1884, Henderson duly gave notice of his intention to take the oath for the relief of poor debtors, before Henry W. Bragg, a master in chancery, and several hearings were had. On March 7, 1885, pending the examination, the plaintiff duly filed before Bragg charges of fraud, among which was the one sworn to in the affidavit, and hearings were had on such charges. The hearings on the charges of fraud were continued from time to time, and finally to April 18, 1885, at one P. M., at which time the plaintiff and Henderson appeared and remained during the whole hour, and after the lapse of the hour the plaintiff, before the appearance of the magistrate, departed. The magistrate, Bragg, was not in attendance within the hour, and did not appear and attend until a quarter past two o'clock, nor did any other magistrate attend in his place, and there were no further adjournments or proceedings had.

The defendants contended that the affidavit was made by the plaintiff falsely, fraudulently, and without probable cause, and that the plaintiff did not, at the time he made it, believe or have good reason to believe the affidavit to be true. The plaintiff, before any evidence was offered by the defendants, asked the judge to rule that no evidence could be offered or introduced in this action to control or affect the affidavit, or to show that the affidavit was false, fraudulent, or made without probable cause, or that the plaintiff did not believe, or had no good reason to believe, that the affidavit was true; but the judge refused so to rule, and admitted evidence to show that the affidavit was false and fraudulent, and made without probable cause, and that the plaintiff did not believe, and had no good reason to believe, the affidavit to be true at the time of making.

The judge instructed the jury, that the burden of proof

was upon the defendants to establish the defence of fraud, and it must be proved affirmatively; that it was not sufficient to show that Henderson intended to pay the debt when he contracted it, nor that the plaintiff when he made the affidavit had no good reason to believe that Henderson did not intend to pay the debt when he contracted it; that, while it was necessary for the defendants to prove both these propositions, they must go further, and prove that the plaintiff did not believe the affidavit when he made it, and that it was in fact a corrupt affidavit; that if the defendants proved all this, and that the magistrate's certificate authorizing the arrest was obtained by the fraud and perjury of the plaintiff, the plaintiff could not avail himself of the arrest thus obtained as the foundation of his cause of action, but as between the plaintiff and these defendants the arrest and recognizance would be void, and their verdict should be for the defendants; but that if the defendants had not sustained the burden of proof, and established wilful fraud and perjury on the part of the plaintiff, their verdict should be for the plaintiff in the penal sum named in the recognizance.

The jury found for the defendants; and the plaintiff alleged exceptions.

Knowlton, J., for the court. — The defendants contend that the recognizance declared on cannot be enforced, because the proceedings in which it was taken were founded upon a wilfully false affidavit of the plaintiff. The act imputed to the plaintiff involves such moral turpitude that we cannot permit him even temporarily to profit by it, unless upon principle as well as authority our duty is clear.

The wrong complained of, so far as it affects the question before us, was like an ordinary malicious prosecution of a groundless suit. The proceedings for the arrest of the defendant Henderson were in the nature of a new prosecution. They were for the purpose of obtaining a remedy which was not available without them. The statute provides that they 'shall be considered in the nature of a suit

at law.' Pub. Sts. c. 162, § 49. They were founded upon allegations of fact, heard at first ex parte, which, if issue was taken upon the arrest, were afterward to be regularly tried between the parties, with a view to an adjudication which should give or withhold the remedy sought. It is admitted that the affidavit was proper in form and substance, that the magistrate had jurisdiction to act upon it, and that he judicially found the facts alleged in it to be true, and signed a certificate authorizing the arrest. The arrest was regularly made by a proper officer, and the defendant Henderson was taken before a magistrate, and there entered into the recognizance in suit. The proceedings being conceded to have been in all other respects legal and proper, it is contended that the known falsity of the plaintiff's allegations in his affidavit rendered the arrest, as to him, illegal, and the recognizance void.

It is familiar law that an officer called upon to serve a process needs only to see that it is good upon its face, and it is not suggested that the conduct of the officer or of the magistrate in relation to this arrest can be called in question. But there are cases in which an officer is protected in making an arrest, when the person who caused it or set the proceedings in motion is liable. If the arrest in this case was legal as to the plaintiff as well as the officer, the recognizance founded upon it was legal also, and can be enforced in this action. If it was illegal as to the plaintiff, he can be sued in trespass for causing it, the process as to him is no justification, and the recognizance is tainted with illegality and is void. We are brought, therefore, to the inquiry, Under what circumstances is an arrest under process illegal, as to the party causing it to be made?

There is no doubt that one who obtains a process and causes it to be served assumes the duty of seeing that it is well founded. He should know that it rests upon a good record, or other proper preliminary proceeding; but so far as the matter depends upon an adjudication by a court or magistrate having jurisdiction, he may rely upon that.

Processes good on their face may be absolutely void for want of jurisdiction in the court or magistrate that issues them, or they may be voidable for error, or they may be voidable for irregularity in obtaining them. Processes voidable for error do not subject the person who directs their use to any liability, even after they are set aside. But processes irregularly obtained may be set aside, and then, as against those who obtained them, acts done under them are deemed to have been done illegally. Cassier *v.* Fales, 139 Mass. 461; McGregor *v.* Crane, 98 Mass. 530; Barker *v.* Braham, 3 Wils. 368; Tarlton *v.* Fisher, 2 Doug. 672; Belt *v.* Broadbent, 3 T. R. 183; Bates *v.* Pilling, 6 B. & C. 38; West *v.* Smallwood, 3 M. & W. 418; Collett *v.* Foster, 2 H. & N. 356, 361; Chapman *v.* Dyett, 11 Wend. 31; Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.), 242; Lovier *v.* Gilpin, 6 Dana, 321.

In cases of error, the judicial action in which the error is found is a justification for all who have acted in reliance upon it. In Marks *v.* Townsend, 97 N. Y. 590, where a process for arrest was set aside for error, it was held that the person who obtained it was not liable, and it was said in the opinion, that if he had known facts which made the arrest improper, and, concealing them, had maliciously made the affidavit and caused the arrest, he would not have been liable for false imprisonment, but only for malicious prosecution. The affidavit seems to have been of matters other than those to be tried in the proceeding then instituted, and against this dictum there are conflicting dicta in other cases. Some judges have intimated that action like that supposed would constitute irregularity, for which the process might be set aside even if there was error also, and that the affiant would then be liable in trespass for false imprisonment. Williams *v.* Smith, 14 C. B. (N. S.) 596; Smith *v.* Sydney, L. R. 5 Q. B. 203; Daniels *v.* Fielding, 16 M. & W. 200.

The cases of irregularity cover a variety of defects in the record, or in other preliminary proceedings. Irregularities

do not result from wrong adjudications, and in that respect they differ from errors. But irregularities, whether we include in the term those fundamental defects which go to the jurisdiction and render the process void, or limit it by a stricter definition which will comprise only those upon which the proceedings may be set aside, do not include false allegations of fact, made as a foundation for a suit in which the allegations are to be proved or disproved. And this is equally true whether they are falsely made by mistake or by design.

The remedy for causing an arrest by maliciously bringing a suit upon false charges, or maliciously making a false affidavit, is by an action on the case for a malicious prosecution. Legallee *v.* Blaisdell, 134 Mass. 473; Luce *v.* Dexter, 135 Mass. 23; Baron *v.* Sleigh, 2 Cro. Eliz. 628; Daniels *v.* Fielding, 16 M. & W. 200, 207; De Medina *v.* Grove, 10 Q. B. 152, 170; Sheldon *v.* Carpenter, 4 N. Y. 578. These authorities imply the negative, that an action of trespass for the arrest or for false imprisonment will not lie. And this point has been directly adjudicated. Coupal *v.* Ward, 106 Mass. 289; Mullen *v.* Brown, 138 Mass. 114; Langford *v.* Boston & Albany Railroad, 144 Mass. 431; Wood *v.* Graves, 144 Mass. 365; Daniels *v.* Fielding, 16 M. & W. 200. Barber *v.* Rollinson, 1 C. & M. 330. In each of the first three of the latter cases the arrest was upon a criminal prosecution, and the complainant did not cause it in the same sense as one causes an arrest who sues out a capias for his own purposes, and gives it to an officer with directions to serve it. One who makes a criminal complaint does not commonly direct the service of the precept, but from the beginning the control of the prosecution is with the officers of the law. In Wood *v.* Graves, ubi supra, in which the arrest was under a criminal warrant, it was held that the defendants were not liable for false imprisonment on account of abusing the process by procuring it to be issued for an improper purpose, and that the only abuse which would render them liable was an im-

proper use of it after it had been served. In Cassier *v.* Fales, 139 Mass. 461, it is said that 'it is difficult to see how any person can be guilty of a trespass in serving or causing to be served a valid writ, or other process of a court.' Lovier *v.* Gilpin, 6 Dana, 321, 328, was an action of trespass against the plaintiff in a civil suit, for causing an attachment of property and assisting the officer in making it. There was an offer to show that the process was maliciously obtained, and in an elaborate opinion, reviewing the cases and holding that the action could not be maintained, Marshall, J., said: 'We have found no case in which a party who institutes a groundless proceeding has been held liable as a trespasser for what is done by his direction, or with his aid, in the regular course of that proceeding, unless the process under which the act complained of was done be void, or unless, if voidable only, the process itself, or the proceeding on which it rests, has been set aside or annulled before the action of trespass is brought.'

The doctrine that the validity of proceedings in a suit at law cannot be called in question on the ground that it is not well founded in fact, rests upon important considerations of public policy. Every suit involves allegations of fact upon which a claim is founded. If the claim is resisted, the truth or falsity of the allegations is to be ascertained by a trial in the suit itself. The bringing of the suit is an offer on the part of the plaintiff to prove them. All action in the case proceeds upon the theory that the plaintiff is ready to maintain his claim, and that he may or may not succeed in establishing it. Every step in the suit is incidental to the purpose for which it is presumed to have been brought, — that of determining whether its allegations are true, and of obtaining a remedy if they are proved. Provisions are made for preserving the rights of both parties. They all recognize that the existence of a just cause of action is in dispute, and is to be regularly inquired into and finally passed upon in the suit itself. Whatever the law prescribes in the course of the proceeding, whether for

the security of the plaintiff by way of attachment or arrest, or for the protection of any other interests of either party, may be legally done, and an ultimate decision that the plaintiff was mistaken or wilfully false in the original statement of his cause of action should not render it invalid. And this because there must be incidental acts, oftentimes of great importance and variety, in the litigation of a disputed question; and it is necessary that rights dependent upon these acts should be fixed and stable. Neither the plaintiff, nor any one else connected with the suit, should be called upon by the defendant to try collaterally the questions involved in it.

If, while the suit is pending, it should be attempted to separate the question of the merits of the action from that of the plaintiff's belief in regard to the merits of it, it would be practically impossible to do it. The rule is familiar, that an action for malicious prosecution cannot be maintained until the original suit has first been determined in favor of the original defendant. So long as anything remains open for trial upon the plaintiff's allegations in that, it will be deemed to have been properly brought. When it has been decided in favor of the defendant, he may show, if he can, that it was brought maliciously and without probable cause, and recover damages for the wrong done him.

There is no want of jurisdiction, irregularity, or error to affect any of the proceedings in a suit brought in due form, on a maliciously false statement of a claim. The only questionable element in it relates to that which must be uncertain in every case, the validity of the plaintiff's claim, and his belief in regard to it. When the uncertainty as to which of the parties is right is eliminated at the trial by a verdict for the defendant, or the case is otherwise ended in his favor, and an action for malicious prosecution is brought, the former proceedings cannot be set aside, and are not rendered invalid.

In an action for malicious prosecution damages may be

recovered for all the injury which resulted directly from bringing the suit, and from the measures regularly adopted in conducting it. It would be an anomaly if one could recover in such an action, and recover also in trespass from the same defendant for an arrest regularly made as a part of the same prosecution; or if an attachment of property, or any other incidental act from which damage resulted, could be made a separate cause of action, on the ground that it was illegal as against the original plaintiff who caused it; — much more if, before the termination of the original suit, one who as receiptor had contracted with an officer to return attached property on demand could answer the officer's suit for the goods by alleging that the attachment was illegal as against the original plaintiff because the suit was maliciously brought; or if the officer himself could make a similar answer to a suit by the plaintiff for negligence in the performance of his duty in relation to an attachment.

If in the case at bar the arrest was not illegal as against the plaintiff, there was no defect in the recognizance. It was for a good consideration, and was entered into in due form, in accordance with the statute, before a magistrate having jurisdiction. Moreover, under our law it became the only security of the plaintiff, and stood in place of the judgment and execution. Brown *v.* Kendall, 8 Allen, 209, 210; Morgan *v.* Curley, 142 Mass. 107. It was perfect unless tainted with illegality. But the same considerations that show the arrest to have been regular and legal apply to this also. Indeed, this having been entered into voluntarily by the defendants, the only illegality to affect it must be sought for in the arrest which preceded it.

And it cannot be truly said that the reasoning applicable to arrests or attachments upon ordinary suits maliciously brought is inapplicable to this arrest upon execution. For the affidavit was a statement of matters which if true entitled the plaintiff to prosecute and maintain his suit in this way. The charge of fraud was the foundation of the new proceeding. It was a charge upon which the defendant

could plead not guilty, and demand a trial, which would determine the ultimate rights of the parties. That trial could be had quickly, and the statute contemplated that both parties should proceed regularly in the mode prescribed, to ascertain the truth or falsity of the facts alleged, as they are required to do in any suit at law. The fact that an issue in relation to the pecuniary condition of the defendant was also triable is immaterial. Every reason why arrests and attachments made in suits upon maliciously false declarations should be held legal, can be urged in support of the legality of the arrest in this case.

This case does not fall within the principle of numerous cases in which it is held that one shall not be permitted to take advantage of his own wrong. It is true that an arrest which is accomplished by means of an unlawful act, like breaking a dwelling-house, is void. But in these cases there is illegal action which precedes or accompanies the use of process, and is outside of it, and which leads directly to the arrest, and enters as an element into it. In the case at bar the arrest was not directly caused by an unlawful act. The plaintiff had no connection with it except through the process which he ordered served according to its precept. He made a statement under oath, which showed a proper case for an arrest, and a trial in the manner prescribed by law. The magistrate in a preliminary hearing acted judicially upon it, and gave his certificate of authority. Making a statement in such a case is in itself a lawful act; and a process regularly issued upon it, under which the statement may be further passed upon, is a lawful process. Illegality and fraud taint the statement, but not the process. That is good in law, whether the statement be true or false.

So where unlawful acts have been done in obtaining an attachment of property, like taking possession of it on Sunday, or fraudulently inducing the owner to bring it from a State where it cannot be attached to one where it can, there has been an element of wrong other than in the cause of action upon which the writ was procured. Parsons *v.*

Dickinson, 11 Pick. 352; Ilsley *v.* Nichols, 12 Pick. 270; Deyo *v.* Jennison, 10 Allen, 410. In each of the cases cited there was fraud or misconduct in regard to the property before it was taken under the writ, which made it unlawful for the plaintiff to attach it. The writ of replevin referred to in Pine *v.* Morrison, 121 Mass. 296, was not between the parties to that suit, and did not present for trial the issue presented in that. In Crocker *v.* Atwood, 144 Mass. 588, the fraud was not solely in stating a fictitious claim. The attachment of a particular article of personal property does not ordinarily follow from merely suing out a writ of attachment. Besides obtaining the writ, the plaintiff, in the original case to which Crocker *v.* Atwood relates, 'caused the property to be taken on the attachment,' and this he did with a fraudulent purpose to deprive the defendant of his rights in it. The case merely holds that other fraud may be taken advantage of, notwithstanding that there was a malicious prosecution.

A distinction has sometimes been suggested between illegality as a ground for a suit, and illegality which can be availed of in defence against the claim of another. But no such distinction exists in cases like that at bar. If the arrest was illegal as against the plaintiff, it was so as well for the purpose of sustaining a suit against him for his wrong as for defeating an action brought upon the recognizance. In Ammidon *v.* Smith, 1 Wheat. 447, it was held that the fraudulent taking of an oath by a person under arrest on a civil process, and the obtaining of a release thereby, did not constitute an escape, nor charge the sureties in a suit upon his bond for the prison limits, even though they participated in the fraud. That too was a case in which the oath taken was not the foundation of proceedings for the purpose of trying the allegations contained therein. See also Smith *v.* Quinton, 2 Bray. (Vt.) 200.

If the validity of legal proceedings could be tried collaterally before the termination of the suit, on the ground that a false cause of action was maliciously stated, or that a false

affidavit for arrest was maliciously made, a defendant whose property had been taken might sue for an injunction against the attaching officer. A defendant arrested, instead of trying the facts charged in the affidavit, in the manner prescribed by law, might apply for release upon habeas corpus, or, after a trial upon the charges before a magistrate, and at any time before final judgment in the Superior Court, if he saw he was likely to be convicted, he might make default, and set up, as the defendants have done in this case, the falsity of the affidavit in defence to the supplemental suit upon the recognizance. With such a rule there could be no regularity in procedure, and no certainty as to the value of any security.

In a case of this kind there is no hardship in leaving a party to existing remedies. He may, first, obtain under the statute an early hearing of the matters alleged against him, and secondly, after the case is ended, he may, if the facts will warrant it, bring his action for a malicious prosecution.

If this remedy is not now available to the defendant, it is because of neglect or misfortune for which he is legally responsible. It was his duty to have a magistrate present to hear or continue the cause at the time to which the hearing was adjourned. His neglect of that duty was a breach of his recognizance. Whether, with such a termination of the proceeding, he can now bring a suit for malicious arrest or prosecution is a question which is not before us. In Fortman *v.* Rottier, 8 Ohio St. 548, it was held by a majority of the court, that an action for malicious prosecution could be maintained for procuring an attachment upon a false affidavit, without first getting the proceeding set aside. And in Bump *v.* Betts, 19 Wend. 421, a similar decision was made, where property was attached and a judgment in rem obtained upon a false and malicious affidavit that the defendant had absconded. But in both of these cases it seems that the affidavits were not of matters which were to be tried in the regular course of proceedings instituted by

them, and in that respect they differed from that in the case at bar.

Inasmuch as the jury were permitted to find for the defendants upon a defence which was not properly open to them, the entry must be *Exceptions sustained.*

HOGG *v.* WARD.

Court of Exchequer of England, Trinity Term, 1858. 3 Hurls. & N. 417.

A constable is not justified in arresting a supposed offender for felony, without warrant, at the instigation of a third party, unless there exists a reasonable charge and suspicion.

Trespass for false imprisonment. Plea, not guilty (by statutes 7 Jac. 1, c. 5, § 1; 21 Jac. 1, c. 12, § 5; 19 & 20 Vict. c. 69, § 1; 2 & 3 Vict. c. 93, § 8; 1 & 2 Wm. 4, c. 42, § 19).

At the trial before Martin, B., at the Spring Assizes for the county of York, it appeared that on the 9th of June, 1857, the plaintiff, a butcher residing at South Cave, was arrested by the defendant, the superintendent of police for the district, for having in his possession some traces alleged to have been stolen from one Johnson, who was a person in the habit of attending fairs as an itinerant showman. The traces were on the horse in the plaintiff's cart, which was being driven by his servant at Cave fair. Johnson stopped the cart and said to the defendant, 'These are my traces which were stolen at the peace rejoicing in 1856.' The defendant sent for the plaintiff, who at once attended. The defendant asked the plaintiff how he accounted for the possession of the traces. The plaintiff stated that he had seen a stranger pick them up in the road, and that he had bought them of him for a shilling. The defendant then handcuffed the plaintiff and detained him in custody till the next morn-

ing, when he was taken before a magistrate, who immediately discharged him. According to the evidence of the plaintiff and another witness, Johnson was not present when the defendant took the plaintiff into custody, but the defendant, who was called as witness on his own behalf, stated that Johnson said to him, when the plaintiff arrived, 'These are my traces, and I insist upon your taking him into custody.' The defendant resided about three miles from South Cave, and had known the plaintiff for many years.

At the conclusion of the evidence, the counsel for the defendant submitted to the learned judge that, upon the facts admitted by the plaintiff to be true, the defendant was entitled to have the verdict entered for him. The learned judge intimated that he rather thought there was a question for the jury; and the result was that it was agreed that the opinion of the jury should be taken upon the amount of damages, and the question reserved for the court both upon the law and the fact. Rule obtained to show cause why the verdict should not be entered for the defendant pursuant to the leave reserved.

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. I abstain from expressing any opinion, except what is necessary for disposing of this particular case. The general law and authorities have established that, in order to justify an arrest, there must be a reasonable charge. Whether that is to be decided by the judge as a matter of law, or by the jury as a matter of fact, is not important on the present occasion, because it was expressly reserved for the court to decide. It appears to me in this case there was not a reasonable charge, and that the verdict for the plaintiff ought to stand.

MARTIN, B.—I am of the same opinion. The law is correctly laid down in Burn's Justice, vol. 1, p. 273 (29th ed.), where it is said that a constable may 'apprehend a supposed

offender for a felony without warrant upon a reasonable charge made by a third party, and this although, upon investigating the charge, it turn out that no felony has been committed. But there must in all cases exist a reasonable charge and suspicion.' Therefore the constable is bound to ascertain whether the charge is reasonable. I am of opinion that the charge in this case was not reasonable. The traces, which were on the plaintiff's horse, were alleged to have been stolen. The plaintiff was not present at the time the charge was first made, but, on being sent for, he came and gave an account of how he came possessed of the traces; but, in defiance of that, the defendant arrested and imprisoned him. Looking at all the circumstances, I cannot think that the charge was reasonable, or that there was any real suspicion that the plaintiff had stolen the traces.

Bramwell, B.—I am of the same opinion. The law is correctly laid down in Burn's Justice. It is not every idle and unreasonable charge which will justify an arrest, but there must be a charge not unreasonable. The Metropolitan Police Act, 2 & 3 Vict. c. 47, § 64, authorizes 'any constable belonging to the metropolitan police to take into custody, without a warrant, all persons whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace.' This does not say that any charge is enough, but by implication says only such a charge as gives the constable *good cause* to suspect the person charged. If a person comes to a constable and says of another simpliciter, 'I charge this man with felony,' that is a reasonable ground, and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but he is responsible for so doing. Here the question is, whether the charge was not unreasonable. In my opinion it was a charge most unreasonable. I agree with Mr. Thomp-

son that the case must be treated as if it were a case of recent possession; but then the other circumstances must be looked at. The plaintiff used the traces in the most open manner; and, when asked, he told how he got possession of them, and, moreover, the person who claimed them was a person not unlikely to have lost them.

WATSON, B.—I am of the same opinion. There is no doubt about the law on the subject. So far as my experience goes, it always has been laid down by the judges and in the text-books that a constable may arrest without warrant where there is a reasonable charge of felony. The question here is, whether there was a reasonable charge. I think there was not. The argument as to reasonable and probable cause has no application: the question is, whether a reasonable charge was made. Now, every case must be governed by its own circumstances, and the charge must be reasonable as regards the subject-matter and the person making it. If an idiot made a charge, the constable ought not to take the person so charged into custody. In Isaacs *v.* Brand, 2 Stark. N. P. 167, Lord Ellenborough said that the declaration of the thief did not justify a constable in taking a person into custody upon a charge of receiving the stolen goods. I have attentively considered whether the charge in this case was reasonable, because it is of the utmost importance that the police throughout the whole country should be supported in the execution of their duty, — indeed, it is absolutely essential for the prevention of crime; on the other hand, it is equally important that persons should not be arrested and brought before magistrates upon frivolous or untenable charges. Whether the question of reasonable charge is a matter of law for the judge, or a matter of fact for the jury, I do not express an opinion, as that was left to us, and I come to the conclusion that this was not a reasonable charge. It is not necessary to repeat the facts, but, taking them strongly in the defendant's favor, I think that this was not a reasonable charge,

and that the defendant acted contrary to his duty and contrary to law in arresting the plaintiff.

Rule discharged.

ALLEN *v.* WRIGHT.

Common Pleas of England, Nisi Prius, Trinity Term, 1838.
8 Car. & P. 522.

A private citizen making an arrest on suspicion of felony, without warrant, is justified only in case he can show that a felony had been committed, and that he had reason to believe that the person arrested committed it.

The declaration stated that the defendant, on the 19th of March, 1838, assaulted the plaintiff, and forced and compelled her to go into the public street, and through several lanes, &c., to the police station-house in Tower Street, Lambeth, and there imprisoned and kept her, without any reasonable or probable cause, for twenty hours, contrary to law and against her will; and that on the 20th of March he again assaulted her, and compelled her to go from the station-house to Union Hall Police Office, and there kept and detained her for six hours, whereby she was not only hurt and injured in her body and mind, but also exposed and injured in her credit and circumstances. The defendant pleaded, first, not guilty; and, secondly, a special plea, to the following effect: that the plaintiff was a lodger in the defendant's house, and was supplied with a feather-bed, which, during a portion of the time, was made by the plaintiff and a servant of the defendant; that the plaintiff, while she was such lodger, demeaned herself in an improper, irregular, and disreputable manner, and particularly in receiving the visits of and cohabiting with one G. D., and that, after a certain time, she refused to allow the servant to assist in making the bed, and always locked the door of the room when she went out. It then averred that while the plaintiff continued as lodger, as aforesaid, seventy pounds

weight of feathers were stolen from the bed; and that the defendant, having good and probable cause of suspicion, and vehemently suspecting the plaintiff to be the person who stole them, caused her to be apprehended, &c.

From the evidence on the part of the plaintiff, it appeared that she resided for some time in the house of the defendant with a gentleman named Davison, who passed with her by the name of Gordon. They left in the evening of Friday, the 16th of March, between six and seven o'clock; and, after they were gone, that same evening a friend of the gentleman paid the defendant for him several claims for damage to furniture, &c., and at that time nothing was said about any loss of feathers from the bed. On the evening of Monday, the 19th of March, about ten o'clock, the defendant and his wife were observed by a policeman on duty watching the house No. 12 in the Waterloo Road. The defendant addressed the policeman, and told him he wished to ascertain whether a young woman named Gordon was living there. The policeman inquired what he wanted her for, and was told of the damage sustained, which had been paid for, and also that there was a large quantity of feathers missing out of the bed. The policeman knocked at the door and gained admittance to the house, together with the defendant. The plaintiff inquired who wanted her, and on being told, said she could not see Mr. Wright that night. It was then about twenty minutes past ten. The policeman and Mr. Wright followed the servant upstairs. They saw the plaintiff, and the policeman asked the defendant if that was the person. He said yes, it was, and then charged her with stealing the feathers out of the bed in his house while she was lodging there. The policeman told her that she must go with him to the station-house. She at first objected, but afterwards went, and the defendant made his charge to the inspector, and she was locked up in a cell, where she remained till between ten and eleven the next morning. A duplicate for a bed was found upon her. After the plaintiff had been locked up, the policeman went back with the de-

fendant's wife to the plaintiff's lodgings, but nothing belonging to the defendant was found there. The plaintiff was taken on the next day before Mr. Trail, at Union Hall, who discharged her. The defendant wished him to remand her, but he would not.

It was also proved that the gentleman with whom the plaintiff lived supplied her with adequate means of support; and a witness stated that he had examined the bed, and found it to be a very old one, and expressed it as his opinion that the quantity of feathers in it was sufficient for its size.

Tindal, C. J., after stating the complaint in the declaration and the defendant's answer to it, said: That is an answer which it is incumbent on him to make out to your satisfaction, because he has taken the law into his own hands, by not acting as any prudent person would have done, viz., going before a magistrate and taking out a warrant. At all events, the defendant acted in a very indiscreet manner (as there was no reason to conclude that the plaintiff had any intention to abscond) in not taking the usual and cautious step of having the case investigated by a magistrate before imprisoning the party. The only two points upon which you must be satisfied before you can find a verdict for the defendant are, 1st, that a felony had actually been committed; that some person or other had stolen, according to the evidence, about half the feathers from the bed; and 2d, that the circumstances were such that you yourselves, or any reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it. If you think the circumstances were such, you will find your verdict for the defendant; if you do not, you will find your verdict for the plaintiff, and give her such reasonable damages as you think she is entitled to. *Verdict for the plaintiff.*

See Torts (Students' Series), p. 162, note.

SEDUCTION AND ENTICEMENT.

MARTIN *v.* PAYNE.

Supreme Court of New York, October, 1812. 9 Johns. 387.

A father does not lose his right of action for the seduction of his minor daughter by the fact that, with his consent, she had left his house and entered into the service of another at the time of the seduction.

THIS was an action of trespass on the case for debauching and getting with child Lanah, the daughter and servant of the plaintiff, by which he lost her service, and was obliged to pay a large sum of money for the expenses of her lying-in, &c.

The cause was tried at the Washington Circuit, in June, 1811, before Mr. Justice Spencer. At the trial the daughter of the plaintiff was produced as a witness and proved the seduction and pregnancy, &c.; that at the time of the seduction, which was in the spring of the year 1810, she was nineteen years of age, and lived in the house of her uncle, with whom she had resided from the autumn of 1809. She worked for her uncle when she pleased, and was to receive from him, for her work, one shilling per day. She also worked for herself, and expended all her earnings in clothes and necessaries for herself, as she saw fit. There was no agreement for her continuance in her uncle's house for any particular time; but she went to reside with him on the terms above mentioned, with the consent of her father. The defendant paid his addresses to her while she was at her uncle's, and she expected to have married him, and had at that time no expectation of returning to her father's house

to reside. During the period of her residence with her uncle she occasionally visited her father's house, remaining there a week at a time. Immediately after she was debauched she returned to her father, who supported her, and was at the expense of her lying-in, &c. It did not appear that the father had done any act dispensing with his daughter's service, other than consenting to her remaining with her aunt.

The defendant's counsel objected that the plaintiff was not entitled to recover; but the judge, without deciding the question, permitted the cause to go to the jury, who found a verdict for the plaintiff, subject to the opinion of the court, on the facts in the case as above stated.

Spencer, J., for the court. — The case of Dean *v.* Peel, 5 East, 49, is against the action. It was there held that the daughter being in the service of another, and having no animus revertendi, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it as a departure from all former decisions on this subject. It has frequently been decided that where the daughter was more than twenty-one years of age there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant in such a case. In Bennett *v.* Allcott, 2 Term Rep. 166, the daughter was thirty years of age; and Buller, Justice, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in Postlethwaite *v.* Parkes, 3 Burr. 1878, the action is not maintainable. In Johnson *v.* M'Adam, cited by Topping in Dean

v. Peel, Wilson, J., said that where the daughter was under age he believed the action was maintainable, though she was not part of the father's family when she was seduced; but when she was of age, and no part of the father's family, he thought the action not maintainable. In Fores *v.* Wilson, Peake N. P. Cas. 55, which was an action for assaulting the maid of the plaintiff, and debauching her, per quod, &c., Lord Kenyon held that there must subsist some relation of master and servant; yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant.

Put the case of a gentleman's daughter at a boarding-school debauched and gotten with child: on what principle can the father maintain the action, but on the supposed relation of master and servant arising from the power possessed by the father to require menial services? for in such a case there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law afforded no redress? The case is perfectly analogous to the one before us: here the father merely permitted his daughter to remain with her aunt; he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant de jure, though not de facto, at the time of the injury, and being his servant de jure, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and therefore deny the motion for a new trial.

Motion denied.

SUTTON *v.* HUFFMAN.

Supreme Court of New Jersey, June 1866. 3 Vroom, 58.

A father can maintain an action for the seduction, after majority, of his unemancipated daughter. Presumptively, service done for the father by such daughter is done because it is due to him.

Exception by defendant to the charge of the court to the jury. The case is stated in the opinion of the court.

Bedle, J., for the court. — The exception in this case being so general, and the charge depending so much upon its application to the facts, it becomes necessary, in order to determine its correctness, to state the evidence pretty fully.

The action was brought by Adam Huffman for the seduction of his daughter and servant Margaret Ann, by Emanuel Sutton. As the result of it a child was born on the eleventh day of April, 1861. The daughter, at the time of the seduction, was about twenty-two years of age and the act occurred not at her father's house, but at her brother Gilbert's, who lived about a mile from the father's. Gilbert was an unmarried son of the plaintiff, and lived upon a farm called the Sutton farm, which appears to have been owned by the defendant's father. In the spring of 1859 Gilbert left his father's house to commence farming for himself, and first occupied what is called the Cranmer farm. Margaret Ann went with him, she then being under the age of twenty-one years. He remained upon said farm one year, and moved upon the Sutton farm.

The plaintiff testified that Gilbert rented the Cranmer farm, moved on it, and was single, and had no housekeeper, and that he told him he could have Margaret Ann whenever they could spare her; that she did not go there to receive wages; that she was with Gilbert a good part of the time there, and was at home some; that she came home very often on Satur-

days and staid over Sunday, and sometimes would be at home nearly two weeks; that while Gilbert lived on the Sutton farm, she was about half the time there and the other half at her father's house; that she had part of her clothing at Gilbert's, but the chief part was at the plaintiff's house; that she had to have part at each place; that when she was at her father's, she did whatever her mother told her; that she milked, churned, got the meals, did housework, washing, and sewing; that the plaintiff did not pay her any wages, except such clothes as she needed, and he found her all her clothing, both while she was on the Cranmer farm and the Sutton farm; that her mother would send her shirts to make, and dresses for her sister (the father's family consisted of his wife and ten children, eight boys and two daughters — Margaret Ann, and her sister who was nine years old). That the child was born at the plaintiff's house, the physician's bill was paid by him, and he furnished her with everything necessary for her comfort during sickness, and considered himself bound to do it.

These leading facts were also substantially testified to by Gilbert and Margaret Ann. In addition to them Margaret Ann and Gilbert swear that Gilbert did not pay her any wages, and there was no agreement that he should. Margaret Ann testified that she always went to Gilbert's with the intention of returning to her father's, and that she was subject to the control and direction of her father while on the Cranmer and Sutton farms. The defendant sought to show, by the declarations of Margaret Ann and Gilbert, that Gilbert was to give her one dollar per week and half the poultry. Other evidence was offered by defendant to show that while on the Cranmer farm she had certain nice dresses there; also that Margaret Ann and Gilbert would sometimes go to the store, and each purchased things to be charged to Gilbert, the particulars of which do not appear; also that some shoemaking was done for her and charged to Gilbert. This evidence, together with some other of a general character, was offered undoubtedly to show that the

relation of master and servant did not exist between the plaintiff and his daughter, but that she had left her father's house to do for herself.

A general exception was allowed to the whole charge upon the relationship of master and servant, which charge includes the observations of the justice upon the facts and the law. I will refer to such parts of the charge only as are objected to upon legal grounds.

The court charged that 'it is necessary for the plaintiff to prove that she stood to him in the relation of servant, and that the defendant seduced and debauched her. And first, Did the relation of master and servant exist between the father and the daughter? This form of issue is adapted to the cause of loss of service merely, and was no doubt in its origin used to recover only the damages sustained by such loss and the expenses of the accompanying sickness. But in cases of this kind the loss of service has long ceased to be considered the true gravamen of the action. The real damages sought to be recovered are those occasioned, not by two or three months' illness of the daughter, but the permanent disgrace inflicted upon her and her family, and those subjecting the father to permanent sorrow. Notwithstanding this change in the object of the action the form still continues, and though the amount of service may be very small still the fact must be proved in order to sustain it. In its present scope this action is the only civil remedy for this kind of trespass. Your doubts, if you entertain any upon the first point, may be solved by answering two questions: —

'First. Did Margaret render any habitual service at or about the time she was debauched?

'Second. Was she emancipated?

'As to the first question, if you believe her father, brother, and herself, you cannot doubt that she did serve him at his home occasionally, in the usual way of service by daughters at home, and by sewing for the family while at her brother's. The service need not be of any particular kind, quality, or

amount. Was *any* service lost by the injury? is the question. It need not be menial service, which in law means within walls, or house service, nor need it be continuous or from day to day, nor need the daughter live in the family if she serves out of it. In short, any accustomed service lost by the injury will sustain the action, provided it be service due, and not a mere voluntary courtesy, and service will be regarded as due unless the child is emancipated.

'Second. Was Margaret emancipated? The arrival at twenty-one years does not emancipate a child; if the parent continues to exercise authority and the child to submit to it, the emancipation does not occur. And this is the case with most unmarried daughters whose parents are able to support them.'

After referring to the evidence generally and reflecting upon it the court then stated to the jury that emancipation was a question of intention, and further said: 'With these suggestions I leave it with you to determine whether Margaret or her father, or either of them, intended that she should be free of his control, and without title to his support and protection at the time of the injury. I do not think that the fact that she received wages, or by agreement between her and Gilbert was to receive wages, if that was so, of much if any importance to the question. This was a matter between her and Gilbert, and does not affect her position toward her father, unless she engaged her whole time to Gilbert and that for a period that would indicate her intention to be free from her father. The proof will hardly sustain this view. You have that testimony before you, and must give it such weight as you think it deserves. It consists altogether of hearsay of what Gilbert and Margaret said. It is only important with the view of impeaching them, and not of proving the fact against the plaintiff; as against him it is hearsay.'

It is first objected that the question, 'Did the relation of master and servant exist between the father and daughter?' does not specify the time when such relation should exist.

This objection is more technical than real. Immediately before putting that question the court charges that 'it is necessary for the plaintiff to prove that she stood to him in the relation of servant, and that the defendant seduced and debauched her.' The jury could not have understood from this language otherwise than that the daughter must be the servant at the time of the seduction. The expression cannot fairly be construed to mean anything else; and besides that, the court in submitting the question of emancipation to the jury expressly applies it 'at the time of the injury.' If the defendant desired it more definite than stated, he should have requested it at the trial.

The other objections amount in brief to this; that Margaret, at the time of the seduction, was over the age of twenty-one years, and in the actual service of her brother for wages, and that therefore she could not then be the servant of her father so as to sustain this action. In the first it is not proved that she did receive wages from her brother. As was correctly remarked by the judge at the circuit, the proof of what Gilbert and Margaret had said about that was 'only important with the view of impeaching them, and not of proving the fact against the plaintiff; as against him it is hearsay;' but then if there had been competent evidence of the fact that she received wages, that in itself was not inconsistent with the relation of master and servant between her and her father. Brown *v.* Ramsay, 5 Dutch. 121. It was not necessary that she should be in the actual service of the father at the time of the seduction, if the relation of master and servant then existed. It is true that loss of service in fact, though very slight, must be shown where the daughter is over twenty-one years, the law not presuming service, as in a daughter under age, yet the loss of service in most cases where there is no personal violence occurs months after the seduction. If the relation of master and servant existed at the time, and the service lost afterwards was due the parent by virtue of such relationship as existed at the seduction, it is sufficient to sustain the action. If by

reason of the act the master could not have the benefit of a service due him, by virtue of a relation then existing, even if he did not choose to exact it before, he is entitled to his action. The receipt of wages by the daughter would be a fact as bearing upon the question of emancipation, but beyond that it would not be inconsistent with the child being unemancipated, unless, as remarked by the judge, 'she engaged her whole time to Gilbert, and that for a period that would indicate her intention to be free from her father.' It does not so appear in the case, and the court wisely said, 'the proof made will hardly sustain that view.' As this case stands upon the evidence, the receipt of wages, if proved, would not be inconsistent with Margaret being unemancipated and the servant of the plaintiff.

When the daughter went to her brother's, she was under twenty-one years; while there she attained the age of twenty-one. The attaining that age is not ipso facto an emancipation of the child. That is the well-settled law of this State. 1 Harr. 122; 2 Zab. 409; 5 Dutch. 117.

It is true that the father may then refuse to further support and provide for the child, and the child may then refuse to serve or submit to the control of the parent, but unless either the parent or child has in fact effected the emancipation, the reciprocal rights and duties of the parent and child as to service and support are presumed to exist as before the age of twenty-one. Whether emancipation has occurred is a question of fact, to be determined by the circumstances of the case, according to the intention of the parties. Such circumstances in favor of a continuance of the relation may consist of a tacit consent on the part of the child to serve as before, and on the part of the parent to provide as before. The conduct of each to the other may exist as before without any special contract or understanding, and emancipation would not be accomplished. The parent or[1] child, or either of them, may stand upon their rights to dissolve the relation at that time, if they wish, and if they do in fact the

[1] Sic, for 'and.'

relation of master and servant is ended, but if they do not in fact, and they tacitly continue — the child to submit to the authority of the parent and to serve him in such way as is usual for children, and the parent to exercise authority and provide for the child as before — the child is unemancipated and third parties are bound to respect it. Lipe *v.* Eisenlerd, 32 N. Y. 229.

The question of emancipation, as one of fact, was distinctly left by the judge to the jury, and I find nothing in the charge inconsistent with the rule of law as laid down. The facts as they appear in the case would justify the jury in finding the daughter not emancipated. If she was not emancipated, then the action would be sustained by proof of loss of any service to which the plaintiff was entitled. Upon that point the judge charged 'that any service lost by the injury is the question;' and further, 'in short, any accustomed service lost by the injury will sustain the action provided it be service due and not a mere voluntary courtesy, and service will be regarded as due unless the child is emancipated.' If the child was not emancipated, service performed will be regarded as due the parent. The parent can sustain the action for the services of an unemancipated child over twenty-one years. Brown *v.* Ramsay, 5 Dutch. 118.

In the absence of proof that the parent and child, in the performance of service by the child, had contracted with each other as strangers, the law holds that service done by an unemancipated child is done because it is due to the parent. The service, as already stated, need not be rendered on the day of the injury. If the injury has occasioned any loss of service due by virtue of the relations, though the loss has been sustained long after the injury, it is sufficient. The charge upon this question was entirely correct. It was objected that the question, 'Did Margaret render any habitual service at or about the time she was debauched?' should have been confined to the debauchment. This objection is already sufficiently answered, for the case does not proceed upon the idea that actual service is neces-

sary at that time. The fact of habitual service about the time she was debauched was important as showing the relation of the child to the parent, — how they were accustomed to act towards each other. If before the seduction, and after, as was proved by the plaintiff, she did serve her father when at home, in the usual way of a daughter, and did also serve him at her brother's by sewing for her father's family, it showed a recognition on her part of the continuance of the relationship that existed before she was of age. These acts of service covering the time she was at Gilbert's, or about the time of the seduction, were of the utmost importance upon that subject.

The two questions — one as to the habitual service and the other as to emancipation — cover the whole case upon the relation of master and servant. The judge expressly stated, their doubts, if they had any upon that question, could be solved by answering those two questions, and those questions were correctly put and explained to accomplish that end. I see no error in the charge, and the judgment must therefore be *Affirmed.*

SOUTH *v.* DENNISTON.

Supreme Court of Pennsylvania, September 1834. 2 Watts, 474.

A widowed mother cannot on mere relationship maintain an action for the seduction of her minor daughter.

Writ of error. The action was an action on the case by Sarah South, plaintiff in error, against Joseph Denniston, for the seduction of the plaintiff's daughter. The action was brought by the mother, a widow, during the minority of her daughter. The latter went to live with the defendant's father at the age of eleven, and continued there until her seventeenth or eighteenth year, when the seduction took place, and she was begotten with child by the defendant. The daughter continued to live at the house until the month of June following, when she returned to her mother, with

whom she lived until the child was born, in November. Her mother attended her during her lying-in sickness, before which and after her return she assisted her mother about the house. The court below instructed the jury that the plaintiff was not entitled to maintain the action. This was the subject of the assignment of error.

Gibson, C. J., for the court. — An action on the case for the seduction of a daughter is founded exclusively on the relation of master and servant, not parent and child; and the gist of it is consequential loss of service. By reason of a father's duty to educate and maintain his infant children he stands in the place of a master to them while he retains the right of personal control, even as to such of them as are not under his immediate dominion. But if this right be divested or expired, the relation can be renewed but by actual service, which, to found an action for the interruption of it, must have existed at the doing of the act of which the interruption is a consequence; the difference between it and any other state of servitude being that slighter acts of service are evidence of it. If, however, the right of control be not finally parted with, its existence without actual service is a sufficient foundation for a title to the action; and the decision in Dean *v.* Peel, 4 East, 49, that actual employment in the service of another without an intent to return to the father's protection is fatal to an action in his name, has been justly repudiated, because his right to his daughter's service is independent of her will. But a mother, being at best in the category of a father who has parted with his right, can maintain the action but in proof of actual service at the time of the seduction. Not being bound to the duty of maintenance, she is not entitled to the correlative right of service; and standing as a stranger to her daughter in respect to these, the relation of mistress and servant can be constituted between them but as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it.

These are the fundamental principles of the action, deducible from all the authorities but Sargent's Case, 5 Cowen, 106, and from that case we are constrained to dissent. There it appears to have been decided that a widow whose daughter has been debauched, while out at service under indentures of apprenticeship subsequently cancelled, might maintain the action on the ground that she had succeeded to the parental rights of her husband; or else that the daughter was in her service at the time of the birth. But nothing is more sure than that a mother is not entitled to the service of her child by the common law; and the decision therefore obviously rests on some statutory provisions devolving the parental rights of the father upon his widow, which is not in force here. Yet even that would seem to be inadequate to the maintenance of the action by a widow who had parted with her right without reservation or recall; and even taking for granted that it reverted to her at the cancellation of the indentures, still it did not exist for the purpose of sustaining the relation of mistress and servant at the time of the seduction. The action was therefore not maintainable on the last ground, according to the decision of the same court in Nickleson *v.* Stryker, 10 Johns. 117. But whatever may have been decided, it requires but little aid from authority to sustain a principle so palpable as that a party cannot entitle himself to an action for what was no wrong to him, by employing a disabled servant. An action for loss of service would certainly not lie for beating one who was not in the plaintiff's service at the time, because it would be esteemed an act of folly in him to employ an unfit person; and it must necessarily be indifferent, in point of principle, whether the unfitness were caused by beating or impregnation. It was so considered in Logan *v.* Murray, 6 Serg. & R. 175, where the daughter had come pregnant into the mother's service, after the death of her father, in whose service she had been debauched. As to the child-bed expenses, assuming that the mother is liable to bear them (though we certainly have no law for it), these,

though proper to swell the damages, are not a substantive ground of the action, as was held in Logan *v.* Murray; and as to the argument so earnestly pressed upon us, that she is entitled to compensation for the increased risk of becoming chargeable for the daughter's maintenance as a pauper, it is enough to say that it would make the mother's right depend on the contingent inability of the daughter to maintain herself, which is not the foundation of the action by a father, whose duty to maintain is an immediate one and independent of all consideration of the child's own means. Besides, the principle would give the same right of action to the daughter for the seduction of the mother, and might, under circumstances, entitle the servant for damages for the impregnation of her mistress. That would be an inversion of the principles of the action laid down by this court in Hornketh *v.* Barr, 8 Serg. & R. 39; the authority of which is amply sufficient to sustain the decision of the court below. The daughter, residing in the family of the defendant's father at the time of the seduction, could in no respect be considered her mother's servant; and her subsequent acquirement of the character, if she ever did acquire it, could not vest in the latter a title to the action.

Judgment affirmed.

WESTLAKE *v.* WESTLAKE.

Supreme Court of Ohio, December, 1878. 34 Ohio St. 621.

A wife can maintain an action for loss of the consortium of her husband if the defendant caused the same maliciously.

Action by a married woman for alienation of her husband's affection. Verdict for the plaintiff. Motion by the defendant for new trial on the ground, first, that the petition did not set out a cause of action, secondly, for error of the court in admitting declarations of the husband as to the

cause of his separating from his wife, and thirdly, because the court refused to charge, as requested, that the separation must have been caused maliciously.

The petition stated that 'the plaintiff, Casander Westlake, for her cause of action, complains of said defendants for that said Welling B. Westlake is the son of said Joseph Westlake, and that she was married to said defendant Welling B. Westlake on the 17th day of September, A. D. 1867, in Jackson county, Ohio, and ever since has been and now is his lawful wife. That on the 21st day of October, A. D. 1873, at said county, said Welling B. Westlake was the husband of said plaintiff, and the said Joseph Westlake, well knowing the same, on said 21st day of October, A.D. 1873, and on divers other days and times prior thereto, wrongfully, unlawfully, and maliciously, without any just cause or provocation therefor, in order and for the express purpose of enticing and procuring the said Welling B. Westlake, her said husband, to become alienated in feeling and affection for and disgusted at and with the plaintiff as his wife, wickedly, wilfully, and maliciously spoke of and concerning her, said plaintiff, to her said husband and divers good people, and caused to be circulated and told to her said husband, for the purposes aforesaid, divers false, scandalous, and defamatory words of and concerning her, the said plaintiff, expressly in order to procure and cause said Welling B. Westlake to believe his said wife was an unchaste woman, and to cause him to become alienated from her and despise and refuse to live with her, and to induce said Welling B. Westlake to drive and banish her, said plaintiff, from the home, society, and companionship of her said husband, and in order to further procure and induce her said husband to become alienated from her, and drive and banish her from the home and companionship of her said husband, the said Joseph Westlake promised and proposed to reward the said Welling B. Westlake with property and money if he would expel and drive her, said plaintiff, from his home and companionship; and the plaintiff

further avers that by reason of the false, scandalous, and defamatory words spoken and circulated as aforesaid, by said Joseph Westlake, of and concerning her, this plaintiff, and by reason of the promise of reward by him made to said Welling B. Westlake, and causing the same to be believed and relied on by her said husband for the purposes aforesaid, caused the said Welling B. Westlake to become so alienated and disaffected from and towards this plaintiff as his wife that the said Welling B. Westlake, on said 21st day of October, A.D. 1873, against the will and consent of this plaintiff, caused her, this plaintiff, to be removed from the home, society, and companionship, of her said husband, and then and there, by reason of the said conduct and sayings of said Joseph Westlake, the said Welling B. Westlake, against the plaintiff's will and without her consent, but in compliance with the request, orders, and commands of said defendant Joseph Westlake did take said plaintiff, with a small amount of personal property, into a wagon and hauled her and said property to the distance of seven miles, and there unloaded and deposited her and said property into a small tenement house on the land of T. C. Mitchell, and from thence hitherto, by reason of the conduct and sayings of said Joseph Westlake, refuses to permit her, said plaintiff, to return to him, said Welling B. Westlake, and cohabit with him as his wife, and refuses to provide for and support her, or to contribute anything toward her support. . . .

'She further says . . . the said Welling B. Westlake is unkind to and unfriendly with the plaintiff, and refuses to join with her in this action . . . and plaintiff therefore makes her said husband party defendant with said Joseph Westlake in this action.'

GILMORE, C. J., for the court. — The objection that the original petition does not state facts sufficient to constitute a cause of action raises the question: Can a wife maintain an action, in her own name, for the loss of the society

and companionship of her husband against one who wrongfully induces her husband to abandon or send her away? In answering this question, in view of the legislation of our own State on the subject of the rights of married women, it becomes necessary, not only to look to the doctrine of the common law on the subject, but also to examine the reasons upon which its doctrines rest.

In the early period of English jurisprudence the personal and marital rights of wives were, in some respects, exclusively cognizable in the spiritual courts, and, in other respects, as far as they were recognized at all, the courts of common law.

The common law considers marriage in no other light than a civil contract, some of the incidents of which will be mentioned hereafter. But the *holiness* of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts not having to consider unlawful marriage as sinful but merely as a civil inconvenience. The punishment therefore, or annulling of incestuous or other unscriptural marriages, is the province of the spiritual courts, which act pro salute animae. 1 Black. 432.[1]

The spiritual courts also had cognizance of matrimonial causes or injuries respecting the rights of marriage. Sir William Blackstone enumerates five of such causes, the third of which is: 'The suit for restitution of conjugal rights, which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason, in which case the ecclesiastical jurisdiction will compel them to come together again.' 3 Black. 94. 'In the civil law the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries, and therefore in our ecclesiastical courts a woman may sue and be sued without her husband.' 1 Black. 444.

It is unnecessary to inquire into the extent to which a wife could obtain redress for injuries to her personal or marital

[1] That is not so now in England.

rights in the spiritual courts. The above quotations are made for the purpose of showing that while it may be doubtful, in view of a recent discussion of the subject that will be noticed below, whether the common law regards the right of the wife to the consortium of her husband as of such a nature that pecuniary damages can be given her for being wrongfully deprived of it, yet in a jurisdiction that was exercised concurrently with that of the common law the rights of the wife in these respects were recognized and redressed when injured. The fact that instead of giving her damages for the loss of the consortium of her husband the spiritual courts restored to her the thing itself makes no difference in the principle involved. It is a distinct recognition of the rights of the wife in this respect, by the ecclesiastical law of England, which was founded on the principles of the civil law.

But at common law the husband and wife are one person, that is, the very existence of the woman, together with all her personal rights, are suspended during the marriage, or at least are incorporated and consolidated into that of the husband; and upon this principle, of a union in person in husband and wife depend almost all the legal rights, duties, and disabilities that either of them acquires by the marriage. By the marriage the husband acquires an absolute title to all the personal property of the wife, and a right to reduce her choses in action to possession and thereby make them his own; also he becomes entitled to her labor and services or the proceeds of it, for which latter he may sue in his own name. An injury to the wife is in legal contemplation an injury to the husband only. For a slight battery of the wife the husband may recover damages, but for this he must join his wife in the action. If however she is beaten so enormously that the husband is thereby deprived for any time of her company and assistance, the law then gives him an action in his own name for this beating, per quod consortium amisit, in which he shall recover satisfaction in damages. 1 Black. 442; 3 id. 139, 140.

By comparison the difference between the civil law as administered in the spiritual courts and the common law as administered in the temporal courts, in respect to the personal and marital rights of the husband and wife is plainly apparent. In the former they are regarded as distinct persons, and the wife could have her injuries, of which these courts had jurisdiction, redressed in her own name; while in the latter they are regarded as one person, — the husband whose name must always be used either jointly with the wife or alone for the redress of injuries to the person or personal rights of the wife.

If in this State the common-law dominion of the husband over the property and personal rights of the wife has been taken away from him and conferred upon her, and remedies in accordance with the spirit of the civil law have been expressly given to the wife for the redress of injuries to her person, property, and personal rights, all of which I hope to show has been done, then it must follow that she may maintain an action in her own name for the loss of the consortium of her husband against one who wrongfully deprives her of it, unless the consortium of her husband is not one of her personal rights. It has been already shown that this was one of her ecclesiastical-law rights; and I have said that it is doubtful whether it is one of her common-law rights. But before coming to the case in which the latter question is discussed I will recur briefly to the ecclesiastical law. The spiritual courts also had jurisdiction of defamations. In Palmer *v.* Thorpe, 4 Coke, 19, it is said: 'Touching defamations determinable in the Ecclesiastical Court, it was resolved that such defamations ought to have three incidents,' the first of which is, 'That it concerns matters merely spiritual and determinable in the Ecclesiastical Court, as for calling him "heretic," "schismatic," "adulterer," "fornicator," &c.'

And it was in consequence of such defamations being regarded as matters merely spiritual, that the temporal courts held such words as those above quoted not actionable

per se; for if they were actionable in both the spiritual and temporal courts, then a party could be twice punished for the same words. Byron *v.* Emes, 12 Mod. 106; 2 Salk. 694. And here we have the reason why words imputing a want of chastity to a modest matron or a pure virgin, however publicly spoken, were not actionable at common law without an allegation of special damage. And here the test question under this rule of the common law may be asked: In an action of slander brought by a wife, the husband being joined for conformity, will the loss of the consortium of her husband, in consequence of speaking slanderous words concerning her, constitute special damage for which the action will lie?

This question was very fully discussed and considered in Lynch *v.* Knight and wife, 9 H. L. 577. This was an action brought by a wife, her husband being joined as plaintiff for conformity, against L. for a slander uttered by him to her husband, imputing to her that she had been 'all but seduced by M. before her marriage, and that her husband ought not to offer M. to visit at his house;' and the special damage alleged was that, in consequence of the slander, the husband had compelled her to leave his house and return to her father, whereby she lost the consortium of her husband. It was held that the cause of the complaint thus set forth would not sustain the action, inasmuch as the special damage relied upon did not arise from the natural and probable effect of the words spoken by the defendant, but from the precipitation or idiosyncrasy of the husband in dismissing his wife from his house when he was only cautioned not to let her mix in society. But Lord Campbell was of the opinion that a wife can maintain an action against a third person for words occasioning to her the loss of the consortium of her husband; and that had the words contained a direct charge of adultery against the wife, he should have thought the allegation of special damage sufficient to support the action. In which view Lord Cranworth was strongly inclined to concur.

Lord Campbell further said: 'Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of loss and injury[1] from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of consortium or conjugal society can give a course of action to the husband alone. If the special damage alleged to arise from the speaking of slanderous words, not actionable in themselves, result in pecuniary loss, it is a loss only to the husband; and although it may be the loss of the personal earnings of the wife living separate from her husband, she cannot join in the action. But the loss of conjugal society is not a pecuniary loss; though I think it may be a loss, which the law may recognize, to the wife as well as to the husband.'

In the same case Lord Wensleydale stated that he had considerable doubt upon the point, but that he had made up his mind that the action would not lie. He said: 'It is contended that it may be supported by analogy to the action which the husband may unquestionably maintain for an injury to wife, per quod consortium amisit. I agree with Baron Fitzgerald that the benefit which the husband has in the consortium of the wife is of a different character from that which the wife has in the consortium of the husband. The relation of husband and wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of the children, resembles the service of a hired domestic, tutor, or governess; is of material value, capable of being estimated in money, and the loss of it may form the proper subject of an action, the amount of compensation varying with the position of the parties. This property is wanting in none. It is to the protection of such material interests that the law chiefly attends.'

This case bears more directly upon the question under consideration than any other English case of which I am

[1] That is, *injuria* — wrong.

aware; for, if the loss of the consortium of the husband is sufficient to constitute special damage for which an action of slander would lie at common law, it seems to me that there can be no doubt that, under our statute, such loss will constitute a good cause of action in favor of the wife directly against one who wrongfully causes the loss; and while the discussion leaves the question in doubt at common law, the grounds upon which the judges differ are clearly indicated.

If the husband can maintain an action for the loss of the consortium of the wife, then it seems to me that Lord Campbell is clearly right when he says that he cannot allow the action, for this cause, to the husband alone, and that the loss of conjugal society, though not pecuniary, is a loss which the law may recognize to the wife as well as to the husband.

To avoid the force of this proposition the language of Lord Wensleydale is open to the inference that the husband cannot maintain an action for the loss of the consortium of the wife alone, and that it is the loss of her services, which are of material value, and not the loss of her society, which is of no pecuniary value, that constitutes the gist of the action which the husband may maintain for an injury to the wife; but when the action is well brought for loss of services, it is further to be inferred that the jury may, as they always do, give damages, varying with the position of the parties, commensurate with the real injury including the loss of consortium.

This unsatisfactory state of the common law in reference to the rights of the wife is, I apprehend, partly owing to the subject being cognizable in two jurisdictions and partly to the common-law unity of person in husband and wife and the legal incidents that flow from this unity, both of which were noticed above.

Having shown the doubtful aspect of this question at common law, it will be my object now to show that the reasons that gave rise to those doubts either never existed in this State or that they have been swept away by legislation.

In the first place the subject of marriage and marital rights has never been cognizable in two independent jurisdictions in this State; hence in defamations there was no danger of a person being twice punished for the same words; and consequently it has long been the settled law of this State that words imputing a want of chastity to a woman, married or single, are per se actionable. Sexton *v.* Todd, Wright, 317; Watson *v.* Trask, 6 Ohio, 532; Reynolds *v.* Tucker, 6 Ohio St. 516. In this respect therefore the law of this State has never been in accord with the common law.

Neither could a suit for restitution of marital rights ever have been maintained in any of the courts of this State as it could in the ecclesiastical courts of England; and hence none of the embarrassments that grew out of two jurisdictions having cognizance of different branches of the same subject-matter have ever arisen here. With us, as shown below, whatever rights legal or equitable are recognized to the wife she may defend when threatened, or redress when injured, by actions in her own name.

In the next place let it be admitted that at common law Lord Wensleydale is correct in saying that the benefit which the husband has in the consortium of the wife is of a different character from that which the wife has in the consortium of the husband, and that the difference consists in the fact that the wife in some respects resembles a hired domestic, to whose services the husband is entitled in his own right; let us see if this doctrine of the common law has not been overthrown by the legislation of this State.

By the Act of 1861, S. & S. 389: 'All personal property, including rights in action belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of a violation of any of her personal rights, shall, together with all income, increase, and profit thereof, be and remain her separate property and under her sole control.'

Section 28 of the Civil Code, as amended March 30, 1874, provides as follows: 'Where a married woman is a party, her husband must be joined with her, except when the action concerns her separate property, or is upon a written obligation, contract, or agreement signed by her, or is brought by her to set aside a deed or will, or if she be engaged as owner or partner in any mercantile business and the cause of action grows out of or concerns such business, or is between her and her husband, she may sue or be sued alone. . . . But in no case shall she be required to prosecute or defend by her next friend.'

This legislation in effect abolishes the common-law unity of person in husband and wife, so far as that unity is represented solely by the husband, and in its stead introduces a rule analogous to that of the civil law, by which the wife is so far regarded as a distinct person that she may have her separate property, contracts, credits, debts, and injuries growing out of a violation of any of her personal rights, all of which shall be and remain under her sole control; and in matters concerning them, or any of them, she may sue or be sued alone. Even the wages due for the wife's separate labor, which are of material value, capable of being estimated in money, and to which the common law chiefly attends in giving the husband an action for an injury to the wife, by reason of which he lost her services, has been taken from the husband and given to the wife; not only this, but she may sue for such wages and also for such injury in her own name, and the husband cannot, without her consent, acquire any interest in either.

Consequently, in this respect at least, under our legislation the benefit which the wife has in the consortium of the husband is equal to that which the husband has in the consortium of the wife. If at common law the husband could maintain an action for the loss of the consortium of the wife, I can see no reason why, under our law, the wife cannot maintain an action for the loss of the consortium of the husband. And if it be said that it was the loss of the ser-

vices of the wife that constituted the gist of the husband's action in such cases, it is a sufficient answer to it to say that the reasons upon which this rule of the common law rested either never existed or have ceased to exist in this State.

In Clark *v.* Harlan, 1 Cin. Sup. Ct. R. 418, it is held that the wife may maintain an action for the loss of the conjugal society of the husband. In Cooley on Torts, 227, in a note referring to Lynch *v.* Knight, supra, the learned author closes by saying: 'We see no reason why such an action should not be supported, where by statute the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her.'

Is the right of the wife to the consortium of the husband one of her personal rights? If it is, then the statute makes the right of action growing out of an injury to the right the separate property of the wife, for which the Code gives her a right to sue in her own name. Before marriage the man and woman are endowed with the same personal rights. If under no disability, each is competent to contract. When the agreement to marry is entered into, but before its consummation, each has the same interest in it, and either may sue for a breach of it by the other. In this State neither the husband nor wife unconditionally surrenders their personal rights by consummating the contract of marriage. On the contrary each acquires a personal as well as legal right to the conjugal society of the other, for the loss of which either may sue separately.

A majority of the court are of the opinion that there is a good cause of action stated in the petition.

Did the court err in admitting the declaration of the husband, made in the absence of the defendant, to the effect that the defendant was doing all he could to bring about a separation between the plaintiff and her husband? We think it did. This was clearly hearsay testimony, and nothing else.

In an action for enticing away the plaintiff's wife the

declarations of the wife are not admissible in evidence. Winsmore *v.* Greenbank, Willes, 577. The confessions of the wife, in an action by the husband against her seducer, are not evidence against the defendant. Bull. N. P. 28. So in an action against a third party for inducing the plaintiff's husband to send her away the declarations of the husband, made in the absence of the defendant, are not admissible in evidence.

Did the court err in refusing to charge that, to entitle the plaintiff to recover the defendant must have maliciously caused the separation of the husband and wife? This charge ought to have been given. The term malice as applied to torts does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. 11 Serg. & R. 39, 40. If the conduct of the defendant was unjustifiable and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged.[1]

For error in admitting the declarations of the husband, and in refusing to charge as requested, the judgment must be reversed, and the cause remanded to the Court of Common Pleas for a new trial. *Judgment accordingly.*

White, J., delivered a dissenting opinion on the question of the sufficiency of the petition, and Okey, J., concurred in the same. They considered that the statutes had not conferred any new liabilities against third persons in favor of the wife, and that the question whether the petition showed a cause of action was to be determined by the common law as modified by Ohio legislation; the ecclesiastical law of England having no proper bearing on the case.

[1] It would have been more accurate to say that, if the defendant's conduct (having caused the injury) was unjustifiable — 'without just cause or excuse,' as put ante, p. 100, malice in *fact* would have been inferred; for the court rightly says that the question was for the jury.

TRESPASS UPON PROPERTY.

WILLIAMS *v.* ESLING.

Supreme Court of Pennsylvania, 1846. 4 Barr, 486.

An action lies for a trespass upon a right of way without proof of actual damage.

Trespass on the case for obstructing a right of way over a court. The judge charged the jury that the plaintiff must show some actual hindrance or obstruction to his passage; and that a mere deposit of articles in the court, if removed before causing any obstruction to the plaintiff, would not give a cause of action.

Gibson, C. J., for the court. — An action was maintained in Kirkham *v.* Sharp, 1 Whart. Rep. 333, by the grantee of a private way, against the owner of the soil, standing in the place of the grantor; and avowedly without proof of special damage, or actual obstruction in any particular instance. The necessity of such proof was not even alleged. The difference between that case and this is, that the action here is not, as it was there, against the owner of the soil, but against an intruder without any pretence of title whatever, a difference that will scarce be thought to be unfavorable to the present plaintiff. The English courts seem to have wavered as to the application of the principle to analogous cases; but the only thing like a conflicting authority in the case of a way is the dictum in Woolrych on Ways, p. 283, that it is usual for the plaintiff to prove some damage

from an obstruction of a private way, though to the smallest amount, merely to satisfy the jury that he has been unable, in consequence of the defendant's conduct, to use his right in so ample and beneficial a manner as he had been accustomed to do. But it is not said that proof of special damage is indispensable, or that it is the basis of the action. The case cited for the dictum is Pindar *v.* Wadsworth, 2 East, 154, which, however, is the case of an action, not for obstructing a private way, but for injuring a common by taking away the manure dropped on it by the cattle; and the court certainly did say, that if the commoner who sued for it was not injured by it, he would not have a right to reparation; but it was also said, that the act was a necessary and an immediate damage. In no English case has there been raised a question about the necessity of special damage in an action like the present; but analogies from actions for surcharging a common bear strongly upon it. Hobson *v.* Todd, 4 Term Rep. 71, was such an action; and Mr. Justice Buller said that the plaintiff was entitled to recover without proof of specific damage. That was one ground of his opinion; 'but there is another ground,' said he, 'on which the action may be supported, which is, that the right has been injured.' The solution of the difficulty is in that one word. In Pastorius *v.* Fisher, 1 Rawle, 27, it was said that the law implies damage from the violation of every right; but that, without proof of actual detriment, it implies the smallest appreciable quantity. Now, the grant of a way is exclusive, at least as to strangers; and that every intrusion into the enjoyment of an exclusive right subjects the wrongful participant to an action by the owner of it, was directly adjudged in the case of the dippers at Tunbridge Wells (Weller *v.* Baker, 2 Wils. Rep. 422, (who recovered on an action against one who had usurped the office of a dipper, not having been duly chosen at the court baron. The court held that the very act of intrusion was both an injury and a damage, — an injury, by disturbing the plaintiffs in the exercise of their right; and a damage, in depriv-

ing them of gratuities which they might have received; and it was held that an action on the case lies for merely a possibility of damage. Yet the dippers were not more impeded in their functions by the intrusion there, than was the plaintiff in the actual use of the alley by the intrusion here; for they were left to get all they could earn, and it was not certain they would have earned a farthing of what the intruder got. But their exclusive right was violated, and a possibility of detriment from it was held to be a subject of compensation. In Hobson *v.* Todd, Mr. Justice Buller applied the same principle to an action by a commoner, saying that had it not been for the surcharge, the plaintiff's cattle might have eaten every blade of grass that had been eaten by the supernumerary cattle of the defendant. Such a plaintiff might undoubtedly recover without proof that the surcharge had occasioned a scarcity; and why not the plaintiff before us, without proof that ground enough had not been left for the convenient enjoyment of his right? There is an error in forgetting that he is entitled to the exclusive use of the whole of it, which would equally justify any usurpation of a man's right of property that left him enough for a comfortable subsistence. The very breaking in upon the defendant's privacy was a damage; and if the plaintiff could not sue for it because the extent of it was inappreciable, the defendants might establish a right of participation in the use, by acts of intrusion repeated for twenty years, just as a wrong-doer, it was said by Mr. Justice Buller, in Hobson *v.* Todd, and by Mr. Justice Grose, in Pindar *v.* Wadsworth, might establish a right of common, because the cattle of the commoners had been left enough of grass to keep them from starving. With much more force is that principle applicable to the case before us. The legal title to the soil is in the common-law heir of the purchaser of it, who annexed the use of it to the Chestnut Street lots, with which he subsequently parted; and as he has no beneficial interest involved in it, or motive to burden himself with a lawsuit, for a trespass on it, the

defendants would certainly gain a concurrent right to the easement by adverse user of it, if no one else could sue for anything short of an actual hindrance in the enjoyment of it. Who would contest the matter with them? The plaintiff would scarce bring a separate action for each obstruction, or sue for damage to the amount of a few cents, for the detention of his carriage or his cart for a few minutes; for though these petty annoyances are exceedingly irksome in the aggregate, not one of them, singly, would be worth the trouble of a lawsuit. He might as well give up his right at once, as attempt to maintain it by repeated actions for repeated hindrances. But the measure of damages is not the extent of each particular loss. The right being established, a jury is at liberty to enforce it, by making the offender smart for any further violation of it. When the plaintiff showed that impediments were placed in the alley which might have prevented him from attempting to use it, he showed enough to entitle him to a remedy without proof of an attempt actually frustrated; and an intruder can ask no more.

Judgment reversed, and venire de novo awarded.

CUTTS *v.* SPRING.

Supreme Court of Massachusetts, May, 1818. 15 Mass. 135.

A dissessor may maintain trespass.

TRESPASS quare clausum fregit, and for cutting timber on a tract of land in Hiram, in the county of Oxford. On the general issue joined, trial was had at the last October term, before Thatcher, J. The plaintiffs proved the cutting of the trees on the land described, their title to which they derived as follows: In 1771 the government of this then province granted to one Benjamin Prescott a certain tract of land, which he caused to be surveyed and upon which he

entered. In 1809 his son, Henry P., conveyed the south-easterly half thereof to the plaintiffs, who entered, and became seised and possessed thereof, including the locus in quo.

The defendants offered to prove that, since the trespass was committed, the Commonwealth had recovered judgment upon an inquest of office against the plaintiffs, upon the ground that they, as assignees of said Benjamin, held and claimed more lands than they were entitled to hold under the said grant; and that commissioners, appointed pursuant to law, had assigned to the plaintiffs a tract of land, being part of what they claimed to hold, but not including the locus in quo. The judge refused to admit this evidence; and a verdict was returned for the plaintiffs, which was to be set aside and a new trial had, if the said evidence ought to have been admitted.

By the Court. — The grant of the government to B. Prescott in 1771, and his surveying, fixing the bounds, and entering upon the land, gave him a seisin, although he included more land within his location than his grant conveyed to him. His title descended, with the possession, to his son, and the deed of this latter conveyed the seisin to the plaintiffs in 1809.

It is wholly immaterial to the defendants whether the location covered more land than the terms of the grant would warrant. The plaintiffs were seised as well as possessed, in regard to every one but the Commonwealth, who might, or might not, reclaim part of the land located, as not conveyed.

The action, therefore, is rightly brought, and the value of the trees is the proper measure of the damages. For the Commonwealth has a right to call the plaintiffs to account, by a suit for the mesne profits, or in some other way; and as the defendants were wrongdoers to the plaintiffs, these latter ought to be in possession of the value of the trees, as a fund to meet the claim of the Commonwealth. If not

called upon, they have a right to keep the money for their own use, being accountable to none but the Commonwealth.

Judgment on the verdict.

MURRAY *v.* HALL.

Common Pleas of England, Hilary Vacation, 1849. 7 C. B. 441.

Trespass quare clausum fregit lies by one of several tenants in common against his cotenant, where there has been an actual expulsion.

This was an action of trespass for breaking and entering the dwelling-house of the plaintiffs, and expelling them therefrom, and seizing and converting their goods.

The defendant pleaded, first, not guilty; secondly, as to the breaking and entering the dwelling-house, leave and license; thirdly, that the premises were not the premises of the plaintiffs; fourthly, as to the goods, leave and license; fifthly, that the goods were not the goods of the plaintiffs: upon which issue was joined.

The cause was tried before Maule, J., at the sittings at Westminster, in Easter Term, 1847. The facts appearing in evidence were as follows: The three plaintiffs and one Hart had jointly become tenants of the premises in question — a room used as a coffee-room by the members of a temperance society — to one Hall. On the 23d of November, 1846, the defendant and Hart forcibly expelled from the premises a person named Adams, who had been placed there by Murray.

On the part of the defendant it was proved that Hart, on the 5th of November, 1846, surrendered his interest to the defendant by a document of which the following is a copy: —

'Mr. W. Hall.

'Sir, — The premises I and my copartners hold of you, being situated No. 11 Stacey Street, St. Giles's, I, in the

name of the same, give up, as we cannot pay you the rent due, my copartners having misapplied the same.

'Yours, &c.,

'JOHN HART.

'P. S. — I have given the key to Mr. G. for you.'

It was then insisted for the defendant that the surrender by Hart at all events inured as a surrender of his own interest, and made Hall tenant in common with the three plaintiffs; and that one tenant in common could not maintain trespass against his companion, even for an actual expulsion. Cubitt *v.* Porter, 8 B. & C. 257; 2 Mann. & R. 627. And see Wiltshire *v.* Sidford, 1 Mann. & R. 403. On the part of the plaintiffs it was objected that, since the new rules, a surrender must be pleaded specially. The learned judge told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the premises by the defendant, their verdict ought to be for the plaintiffs. The jury returned a verdict for the plaintiffs; damages £35. Rule nisi to enter nonsuit.

COLTMAN, J., for the court. — This was an action for breaking and entering the plaintiffs' dwelling-house, and expelling them therefrom, to which the defendant pleaded, first, not guilty; secondly, leave and license; thirdly, a denial that the dwelling-house was the plaintiffs'.

At the trial before Maule, J., one ground of defence was that the defendant was tenant in common of the house with the plaintiffs, and that therefore the action was not maintainable. The learned judge told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the house by the defendant, their verdict ought to be for the plaintiffs. The jury found for the plaintiffs; damages £35.

The defendant afterwards obtained a rule to show cause why a nonsuit should not be entered (pursuant to leave given at the trial), on the ground that one tenant in common can-

not maintain trespass against another, even though there has been an actual expulsion.

On showing cause, it was argued (before the Lord Chief Justice, and Justices Coltman, Cresswell, and V. Williams) that this defence, even if sustainable, ought to have been specially pleaded. It is unnecessary to give any opinion on this point, for we are of opinion that the defence is not sustainable.

The court has felt some difficulty on the question, by reason only of the doubts expressed by Littledale, J., in his judgment in Cubitt *v.* Porter, 8 B. & C. 269. That learned judge there said, that although if there has been actual ouster by one tenant in common, ejectment will lie at the suit of the other, yet he was not aware that trespass would lie; for that in trespass the breaking and entering is the gist of the action, and the expulsion or ouster is a mere aggravation of the trespass; and that, therefore, if the original trespass be lawful, trespass will not lie. It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established, in the case of Goodtitle *v.* Tombs, 3 Wils. 118, that a tenant in common may maintain an action of trespass for mesne profits against his companion, it appears to us that there is no real foundation for the doubts suggested.

We are, therefore, of opinion that the direction of Maule, J., at the trial, was right; and consequently this rule must be discharged. *Rule discharged.*

CHURCHILL *v.* HULBERT.

Supreme Court of Massachusetts, September, 1872. 110 Mass. 42.

Under an irrevocable license to enter another's lands, the licensee is not entitled to enter forcibly.

THE case is stated in the opinion of the court.

MORTON, J., for the court. — This is an action of tort for an assault and battery. The evidence tended to show that the defendant forcibly entered the premises of the plaintiff for the purpose of removing certain manure which he claimed as his property; that the plaintiff, being present, forbade his entering and resisted it by seizing the heads of the defendant's horses to prevent them from proceeding further, and thereupon the defendant struck him with a shovel and broke his arm, and then proceeded to remove the manure. The defendant claimed that he had an irrevocable license to enter and remove the manure, and asked the court to instruct the jury 'that if the defendant had a license from the plaintiff, unrevoked or irrevocable, to enter the plaintiff's premises to remove manure which belonged to the defendant, and the defendant did no more than was necessary to enter and remove the same manure, he is not liable in this action.' The court refused this request, and instructed the jury in substance that though the defendant had an irrevocable license to enter and remove the manure which belonged to him, yet if the plaintiff resisted the defendant's entry, under a claim that the defendant had no manure left on the premises, the defendant had no right to use personal violence to overpower the plaintiff's resistance and enforce his claim.

We are of opinion that these instructions were at least sufficiently favorable to the defendant. The cases cited by his counsel show that if he had an irrevocable license to enter he would not be liable in an action for trespass quare

clausum for an entry if he could make it without opposition or resistance; but the authorities are clear that, if resisted, he had no right to enforce his claim by a breach of the peace. Sampson *v.* Henry, 13 Pick. 36; Commonwealth *v.* Haley, 4 Allen, 318; 3 Black. Com. 4. If it be assumed therefore that the defendant had an irrevocable license to enter the plaintiff's premises, yet upon being resisted it was his duty to desist from his attempt to enter, and resort to his legal remedies. He cannot justify a resort to personal violence to enforce his rights.

Exceptions overruled.

MALCOLM *v.* SPOOR.

Supreme Court of Massachusetts, March, 1847. 12 Met. 279.

An officer who enters a house by authority of law, and attaches goods therein, becomes a trespasser ab initio by placing there an unfit person, as keeper of the goods, against the remonstrance of the owner of the house.

The case is stated in the opinion of the court.

Shaw, C. J., for the court. — This was an action of trespass, in which the plaintiff declared against the defendant for breaking and entering her house, &c. The defendant justified under a writ directed to him, as constable, and commanding him to attach the plaintiff's household furniture.

The case comes before us on exceptions, from which it appears that the defendant was a constable, and that he entered the plaintiff's house, having a writ against her, and attached her furniture; that he took with him into the house a man who was intoxicated, whom he made keeper of the attached furniture, and left in the house in charge of the furniture, although the plaintiff objected to his remaining there as keeper, on account of his intoxication.

The exceptions also set forth the violent conduct of the keeper, and other matters, which are not material to the decision of the question that is brought before us.

The Court of Common Pleas, in which the trial was had, instructed the jury that if the defendant, under color of his process, took with him a grossly intoxicated and clearly unfit person into the plaintiff's house, and left him therein as keeper, this was such an abuse of his authority as made him a trespasser ab initio; and that the defendant was answerable for all the acts of such keeper, done in pursuance of previous concert between them, or by direction of the defendant. A verdict was returned for the plaintiff; and the question whether these instructions were right has been submitted to us without argument.

It has been held as a rule of the common law, ever since the Six Carpenters' Case, 8 Co. 146, that where one is acting under an authority conferred by law, an abuse of his authority renders him a trespasser ab initio. Melville *v.* Brown, 15 Mass. 82. In the case before us, the defendant had authority by law to enter the plaintiff's house, to serve legal process; but placing there an unfit and unsuitable person, to keep possession of the attached goods in his behalf, until he could remove them, against the remonstrance of the plaintiff, was an abuse of his authority, which rendered him liable as a trespasser ab initio.

An officer cannot legally stay in another's building, to keep attached goods therein, nor authorize any other person to remain therein, as keeper, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building, without rendering himself liable as a trespasser. See Rowley *v.* Rice, 11 Met. 337.

Exceptions overruled.

CONVERSION.

ARMORY *v.* DELAMIRIE.

In Middlesex, coram Pratt, C. J., 1722. 1 Strange, 505.

The finder of a jewel may maintain trover against a stranger for conversion of it.

The plaintiff, being a chimney-sweeper's boy, found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted on having the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled: —

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect. Jones *v.* Hart, 2 Salk. 441, cor. Holt, C. J.; Mead *v.* Hamond, 1 Strange, 505; Grammer *v.* Nixon, ib. 653.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did.

BRISTOL *v.* BURT.

Supreme Court of New York, November, 1810. 7 Johns. 254.

To constitute a conversion it is not necessary to show a manual taking of the thing in question; enough if the one entitled to possession is wrongfully excluded therefrom.

This was an action of trover, brought to recover the value of ninety-five barrels of potashes. The cause was tried at the Onondaga Circuit, the 7th of June, 1810, before the Chief Justice.

The defendant was in 1808, and still is, the collector of the port of Oswego, on the south side of Lake Ontario. In May, 1808, the defendant was applied to, to know whether he would grant clearances for ashes for the port of Sackett's Harbor, which is the next adjoining port in the county of Jefferson, and on the south side of the lake, and adjacent to the province of Canada. The defendant answered that he did and should continue to grant clearances; and the defendant was informed of the intention of the plaintiff to bring ashes to Oswego, for the purpose of sending them to Sackett's Harbor. About the 1st of July, the plaintiff sent ninety-five barrels of potashes to Oswego, which were put into the store of a Mr. Wentworth, who gave the plaintiff a receipt for them. The plaintiff applied to the defendant for a clearance, in order to transport the ashes to Sackett's Harbor; but the defendant refused to grant it, alleging as a reason for his refusal that though he did not suspect the plaintiff intended to send the ashes to a British port, yet he believed that the collector at Sackett's Harbor would not do his duty, and that the ashes would be sent thence to a British port. The defendant at the same time promised the plaintiff that, if he did not receive instructions to the contrary from the Secretary of the Treasury within a fortnight,

he would give a clearance to the plaintiff's ashes. After the expiration of that time, the defendant still refused to grant the clearance, though he admitted that he had received no new instructions from the Secretary of the Treasury, nor had he received any instructions forbidding such clearances. He assigned no other reason for his refusal than his suspicion that the collector at Sackett's Harbor would not do his duty; and persisted in refusing a clearance, though the plaintiff offered to give bonds that the ashes should be delivered at Sackett's Harbor. The plaintiff then expressed his desire to take the ashes up the river; but the defendant declared that the plaintiff should not take them from Wentworth's store, unless he gave bonds for double the value of the property, to carry the ashes to Rome, in the county of Oneida, and leave them there, while the embargo continued; that the property was under his jurisdiction and charge; that he had control over all the stores and wharves where ashes were placed, and had employed armed men; and that he had the right to prevent their removal, and would exercise it. Two armed men were stationed near Wentworth's store during two nights, and an armed sentinel was constantly on duty, night and day, at the public store of the collector, within ten rods of Wentworth's store, and in view of it, for the purpose of observing boats, and preventing the removal of the property. The defendant avowed his determination not to permit any ashes to be removed from any of the stores in Oswego. The defendant demanded the ashes in question from Wentworth, who refused to deliver them; but, in order to prevent the defendant from proceeding to extremities, and to satisfy him, Wentworth entered into an agreement with the defendant not to deliver any property from his store without the permission of the defendant.

In the autumn of 1808 the defendant gave a general permission to remove any ashes from Oswego up the river, and thirteen barrels of the potash of the plaintiff were delivered by Wentworth to his order.

On the 13th February, 1809, the defendant gave a written

permit to carry the remaining eighty-two barrels of potashes from Oswego to Rome, in the county of Oneida, requiring of the person to whom they were delivered by order of the plaintiff a written report of the ashes, and an oath that the statement was true, and that he did not intend to violate the law.

It was proved that, when the plaintiff applied to the defendant for a clearance to Sackett's Harbor, potashes were worth at that place $180 per ton, and that the expense of transportation was $4 per ton. That the price of potashes on the 21st July, 1808, in the city of New York, was $173 per ton, but would not sell at Salina, in the county of Onondaga, for more than $150. That when the plaintiff received the ashes, the price of them, in the city of Albany, was $173.50, and the expense of transportation from $25 to $30 per ton.

The Chief Justice charged the jury that, in his opinion, there was sufficient evidence of a conversion by the defendant, and that the plaintiff was entitled to recover for the difference in the value of the ashes at the time when he demanded a clearance and at the time he received them. And the jury found a verdict for the plaintiff, for $1,472.20.

A case was made for the opinion of the court, which it was agreed might be turned into a special verdict.

PER CURIAM.—The only point made in this case is, whether there was sufficient evidence of a conversion to justify the verdict.

There were declarations and acts of the defendant united to form a control over the plaintiff's property. The very denial of goods to him that has a right to demand them, says Lord Holt, in Baldwin *v.* Cole, 6 Mod. 212, is a conversion; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without a cause, takes upon himself the right of disposing of them. The bare denial to deliver is not

always a conversion, as in Thimblethorpe's Case (cited in Bulst. 310, 314), where a piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no act done or dominion exercised; but in the present case there were the highest and most unequivocal acts of dominion and control over the property; not only by claiming jurisdiction over it, but in placing armed men near it to prevent its removal. This fact is of itself a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the sforehouse. It was, therefore, bringing a charge upon the plaintiff; and this, says Mr. Justice Buller, in Syeds *v.* Hay, 4 Term Rep. 260, amounts to a conversion. Neither the case of M'Combie *v.* Davies, 6 East, 538, nor the anonymous case in 12 Mod. 344, were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by Lord Ellenborough the test of the conversion, though the property in that case lay not in the defendant's, but in the king's warehouse. The definition of a conversion in trover, as given by Mr. Gwillim, the editor of Bacon, and now a judge in India, applies precisely to this case. 6 Bac. Abr. 677. 'The action being founded upon a conjunct right of property and possession, any act of the defendant,' says he, 'which negatives, or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use.'

We are, therefore, of opinion that the motion to set aside the verdict must be denied. *Motion denied.*

LOESCHMAN *v.* MACHIN.

King's Bench, Nisi Prius, Hilary Term, 1822. 2 Stark. 311.

The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of a conversion; and so is the auctioneer who refuses, unless the expense incurred be first paid, to deliver it up.

This was an action of trover, brought to recover the value of two pianofortes.

The plaintiff was a maker of pianofortes, and the defendant was an auctioneer. The plaintiff had lent one of the pianos, the larger, to a person of the name of Brown, whose wife was a musical teacher, on hire, for which Brown was to pay at the rate of 18*s.* per month, if he kept it for the whole year; and if for a less period, he was to pay a guinea per month. With respect to the other piano, it did not appear very clearly on what terms it had been delivered by the plaintiff to Brown, whether upon hire, or that he might dispose of it for the plaintiff. Brown had sent both these pianos to the defendant, to be sold by auction, and he, upon the plaintiff's application to deliver the pianos to him, refused to deliver them unless the plaintiff would pay the amount of certain expenses which had been incurred.

Abbott, J., in summing up to the jury, said, I wish you to find whether the smaller piano was let on hire, or sent to be sold by Brown, if an opportunity offered; this is a question of fact for your consideration; and although I am of opinion that it will make no difference as to the verdict, it will give the party an opportunity of making the distinction. The general rule is, that if a man buy goods, or take them on pledge, and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser; except, indeed, in the case of a sale in market overt. With that exception, it is incumbent on the pur-

chaser to see that the vendee has a good title. And I am of opinion that if goods be let on hire, although the person who hires them has the possession of them, for the special purpose for which they are lent; yet, if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion.

The jury found that the smaller piano had been sent to Brown for the purpose of sale, and the plaintiff had a verdict for the value of both the pianos.

DONALD *v.* SUCKLING.

Queen's Bench of England, July, 1866. L. R. 1 Q. B. 585.

It is not a conversion for the pledgee of a chattel to repledge the same, before the maturity of the debt due to him, for a larger sum than that debt.

Declaration. That the defendant detained from the plaintiff his securities for money, that is to say, four debentures of the British Slate Company, Limited, for £200 each, and the plaintiff claimed a return of the securities, or their value, and £1000 for their detention.

Plea. That before the alleged detention the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Sanders, and indorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been paid by the plaintiff, nor by any other person, but was dishonored;

nor was it paid at the time of the said detention, or at the commencement of this suit; and that, before the alleged detention and the commencement of this suit, Simpson deposited the debentures with the defendant, to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security of the debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money thence hitherto have been and remain wholly due and unpaid to the defendant; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

The case having been argued in Easter Term (April 27), before Blackburn and Shee, JJ., was re-argued in Trinity Term. *Cur. adv. vult.*

Shee, J. [after stating the pleadings].[1] — This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the overplus above the amount of the bill and charges to the plaintiff, — that is, to sell on the plaintiff's account and for his and Simpson's benefit, — and a repawn of them by Simpson, as a security for a loan to him by the defendant.

It must be taken against the defendant that the debentures were pledged to him by Simpson before the plaintiff had made default; it must be taken, too, that the advance for which the debentures were pledged to the defendant by Simpson was of a greater amount than the debt for which Simpson held them; it is consistent with the facts pleaded either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson along with other securities, from which they could not at Simpson's pleasure, or on tender by the

[1] Dissenting.

plaintiff of the sum for which they had been pledged to Simpson, be detached; and therefore that Simpson had put it out of his power to apply them by sale or otherwise to the only purpose for which possession of them had been given to him, viz., to secure the payment of his debt and the release of the plaintiff, by the sale of them, from liability on the bill which Simpson had discounted for him.

Whether this pledge to the defendant by Simpson was such a conversion by him of the debentures as destroyed his right of possession in them, and revested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision.

The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was before the case of Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones (on Bailments, pp. 118, 36) to be 'a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged;' and by Lord Holt (Coggs *v.* Bernard, 2 Ld. Raym. at p. 913) to be 'a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor;' and by Lord Stair (Institutions of the Law of Scotland, b. 1, tit. 13, § 11), 'a kind of mandate whereby the debtor for his creditor's security gives him the pawn, or thing impignorated, to detain or keep it for his own security, or, in the case of not-payment of the debt, to sell the pledge and pay himself out of the price, and restore the rest, or restore the pledge itself on payment of the debt, — all which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispone in the case of not-payment;' and by Bell (Principles of the Law of Scotland, §§ 1362, 1363, 4th ed. p. 512), 'a real right, or jus in re, inferior to property, which vests in the holder a power over the subject, to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledger or owner.'

In the Roman civil law, as in our law (see Pigot *v.* Cubley, 15 C. B. N. S. 701; 33 L. J. C. P. 134), the bailment of pawn implied what in this bailment is expressed, — a mandate of sale on default of payment. Without it, or without, as in the Scotch and French law, a right to have a pledge sold judicially for payment on default made, the security by way of pledge would be of little value. The pawnee is said by Lord Coke, in his Commentaries on Littleton, Co. Litt. 89 *a*, to have a 'property;' and in Southcote's Case, 4 Rep. 83 *b*, to have a 'property in, and not a custody only,' of the chattel pawned; by which Lord Holt (2 Ld. Raym. at pp. 916, 917) understands Lord Coke to mean a 'special property,' consisting in this, 'that the pawn is a security to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him;' or, in the words of Fleming, C. J., in Ratcliff *v.* Davis, Cro. Jac. at p. 245, 'a special property in the goods to detain them for his (the pawnee's) security:' that is, not a property properly so called, but the jus in re, that is, in re aliena of the Roman lawyers, the opposite, as Mr. Austin says (Lectures on Jurisprudence, Tables and Notes, vol. 3, p. 192), to property; but a right of possession against the true owner, and under a contract with him until his debt is paid, and a power of sale for the reciprocal benefit of the pawnee and pawnor on default of payment at the time agreed upon.

Mr. Justice Story says (on Bailments, § 324) that 'the pawnee may by the common law deliver the pawn into the hands of a stranger without consideration, for safe custody, or convey the same interest conditionally by way of pawn to another person, without destroying or invalidating his security, but that he cannot pledge it for a debt greater than his own; that if he do so, he will be guilty of a breach of trust, by which his creditor will acquire no title beyond that of the pawnee; and that the only question which admits of controversy is, whether the creditor shall be entitled to retain the pledge until the original debt (that is, the debt due to the first pawnee) is discharged, or whether the owner may

recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee.' So much of this passage as is stated to be clear law, viz., that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (i. e., it may be presumed, on the same conditions as those on which he holds it) by way of pawn to another person for a debt not greater than his own, without destroying or invalidating his security, has no application to the case before us, inasmuch as the pawn by Simpson to the defendant was not for safe custody, nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson, and because the power given to the pawnee by this bailment to dispose of the debentures by sale *or otherwise*, should this debt not be paid, might probably be considered, at least after default made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by the way of query, to the position that a pawnee, who, as in this case, has placed the chattel pawned out of the pawnor's power, and out of his own power to redeem it, by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor's debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr. Justice Story, indeed, says (on Bailments, § 299), 'that if the pledgee voluntarily and by his own act places the pledge beyond his power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of the pledge.' It would be difficult to reconcile any other rule in respect of the pledging by pledgees of the chattels pawned to them with the well-established doctrine of our courts and the courts of the United States of America in respect of the pledging by factors of the goods intrusted to them. Factors, like pledgees, have a mandate of sale, — sale irrespectively of default of any kind is the

object of the bailment to them; they have a special property and right of possession against all the world except their principal, and against him if they have made advances on the security of his goods intrusted to them; to give effect to that security, they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their advances, the pawnee from them (except under the Factors Acts) is defenceless, in trover or detinue, even to the extent of his loan, against the true owner.

Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods, no reason was adduced during the argument before us, nor, indeed, was it possible to adduce any reason, seeing that in all the decisions on pledges by factors the relation between a factor who has made advances on the goods intrusted to him and his principal has been held not distinguishable, or barely distinguishable, in its legal incidents from the relation between pawnee and pawnor; a factor being, as Mr. Justice Story says, 'generally treated in juridical discussions as in the condition of a pledgee.' On Bailments, §§ 325, 327; citing Daubigny *v.* Duval, 5 T. R. 604; M'Combie *v.* Davies, 7 East, 5.

The case of Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, is a clear authority for holding that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and unless that case is also an authority binding upon us for the doctrine that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him, and in an assignee from him, and in an assignee from his assignee, and so on toties quoties, without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment.

As I read the case of Johnson *v.* Stear, and the cases of Chinery *v.* Viall, 5 H. & N. 288, 29 L. J. Ex. 180, and Brierly *v.* Kendall, 17 Q. B. 937, 21 L. J. Q. B. 161, on the authority of which it proceeded, the judgments of the majority of the learned judges of the Court of Common Pleas in the first of them, and the judgments of the Court of Exchequer and of the Court of Queen's Bench in the second and the third, are based on the principle that, in an action to recover damages for a conversion, it is not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages; that when a suitor's real cause of action is a breach of contract, he cannot by suing in tort entitle himself to a larger compensation than he could have recovered in an action in form ex contractu; and therefore that, when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited, in the estimate by the jury of the damages to be paid by him, for the value of such interest or advantage as would have resulted to him from the contract of sale or the contract of pawn, if it had been fulfilled by the vendee or pawnor.

That this was the ratio decidendi in these cases seems to me clear from the facts of Chinery *v.* Viall and Brierly *v.* Kendall, which raised no question between the litigant parties in any respect analogous to the question which we in this case have to decide. In Chinery *v.* Viall, the plaintiff, who was the vendee of forty-eight sheep, for five only of which he had paid, under a bargain which entitled him to delivery of the whole lot before payment, brought his action against the vendor for a conversion by parting with the sheep to another purchaser. If the defendant's interest in the unpaid balance of the agreed price of the sheep had not been credited to him in the amount of damages, the plaintiff, who had only paid for five of them, would have pocketed the full value of the forty-three which had been converted.

In Brierly *v.* Kendall, 17 Q. B. 937, 21 L. J. Q. B. 161,

an action of trespass, there was a loan of the defendant to the plaintiff, secured by bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods until he should make default in some payment. Before any default the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was considered in measuring the extent of the plaintiff's right to damages.

These cases are manifestly not in conflict with, if indeed they at all touch, the principle relied upon against the plea which is here demurred to, that, if the pawnee converts the chattels pawned to him, the bailment is determined and the right of possession revested in the true owner of them.

In Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, the defendant, a pawnee of dock warrants, had anticipated by a few hours only the time at which, under his contract with the owner of them, he might have sold and delivered them; he had applied before the time of action brought the proceeds of their sale to the discharge of the plaintiff's debt to him, or he held them specially applicable to that purpose, and the plaintiff, had he sued the defendant in contract for not keeping the pledge until default made, could not have proved that he had sustained any damage. The Chief Justice, speaking for himself and two of his learned brothers, did, indeed, say that 'the deposit of the goods in question with the defendant, to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.' 15 C. B. N. S. 334, 335,

33 L. J. C. P. 131. But he cannot be understood to have meant by the words 'interest and right of property in the goods,' and by the words 'more than a mere lien,' other than 'a special property,' as defined by the authorities before referred to by me, viz., a real right or jus in re, a right of possession until default made, a right of retention or sale after default made; nor, as I think, to have intended more, by the words 'the wrongful act of the pawnee did not annihilate the contract between the parties,' than that the contract, in the breach of which consisted the tort of which the plaintiff complained, must still be considered to subsist, at least for the purpose of being referred to for the measure of the damage sustained by the pawnor and the damages to be recovered by him.

The case before us differs, as I think, in essential particulars, as respects the principle upon which damages would have been measurable, had the action been in trover, from the case in the Common Pleas. The defendant, as assignee of the pawnee, could not surely have set up in mitigation of damages an interest derived by him from the pawnee before default made by the pawnor; the pawnee, by the express terms of the bailment to him, not having the right to dispose of the debentures by sale or otherwise until after default made. Besides, it is impossible to shut one's eyes to the broad distinction between the case of the sale a few hours too soon of a pawn, which, as in the case of Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, the pawnor 'had no intention to redeem,' — the proceeds of the sale being devoted before action brought to the discharge of the debt for which the pawn had been given as a security, — and the abuse of a pawn by the pawnee in wrongfully, for his own purposes, placing it out of his power, and out of the pawnor's power, to redeem the pawn, should he have the means to do so.

By the contract of bailment between the plaintiff and Simpson, the proceeds of the sale of the debentures, which are the subject of this suit, had been specifically appropri-

ated to the payment of the plaintiff's bill in the event of his not being able to meet it with other means. Simpson held the debentures in trust, should the bill not be paid, to sell them on the plaintiff's account, or allow the plaintiff to sell them or raise money on them to pay his bill. Instead of that, Simpson, before default made by the plaintiff, converted them to his own use, obtaining their agreed value in pledge from the defendant, and imposing upon the plaintiff the burden of making other provisions to meet his bill. By this act of Simpson, the plaintiff, in my judgment, did in fact sustain damage, and at the maturity of the bill, if not before, to the full amount of the current salable value of the debentures. I am at a loss to see how the conduct of Simpson, in thus dealing with the debentures, and how the title of the defendant, claiming under him, are to escape the operation of the rule, that if the pawnee, except conditionally (an exception for which the authority is but slender), parts with the possession of the pawn, he loses the benefit of his security: Ryall *v.* Rolle, 1 Atk. 165; Reeves *v.* Capper, 5 Bing. N. C. 136; Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, per Williams, J.; or the operation of the maxim, 'nemo plus juris ad alium transferre potest quam ipse habet.'

For these reasons, as it seems to me, the case of Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, ought not to govern our decision. It could not be followed by us as an authority in favor of the defendant without inattention to its true principle, viz., that between the parties to a contract the measure of damages for a breach of the contract must be the same, whether the form of action be ex contractu or ex delicto, and that in such a case general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice. It is open also, in a right estimate of it as an authority for the case in hand, to this observation: The interest of a plaintiff in the damages recoverable by him for a tort, which is in its true nature a

breach of contract, is restricted by the implied stipulations of the contracting parties to the amount which, in the conscience of a jury, may suffice to give him an adequate compensation. The action of detinue for a chattel, of which the bailment has been abused, against a person not a party to the contract of bailment, is not based upon a breach of contract, and not within the rules applicable to actions of tort which are based on breaches of contract. In detinue the plaintiff sues, not for the value tantamount of the thing detained from him, but for the return of the thing itself, which may to him have a value other and higher than its actual value; and only for its value if the thing cannot be delivered to him: Tidd's Forms (8th ed. 339); and for damages for its detention and his costs of suit: Peters *v.* Heyward, Cro. Jac. 682; the integral, undiminished thing itself, unaffected by countervailing lien or abatement of whatever kind, being the primary object of the suit. In an action of trover for the conversion by the pawnee of the subject of the bailment, the plaintiff, according to the judgment of the majority of the court in Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, is entitled only to recover the amount in money of the damage which he proves himself to have sustained. In an action of detinue for the recovery from the assignee of the pawnee of the chattel pawned, and of which the pawn has been abused and forfeited, the plaintiff is entitled to recover the chattel itself, because it was a term of the contract of pawn that if the pawn should be abused by the pawnee, his right to the possession of it should cease; and the defendant can have derived no right of possession from one whose own right of possession was determined by his attempt to transfer it.

Unless, therefore, we are prepared to hold, in disregard of the clearly expressed opinion of Story and Mr. Justice Williams, that detinue can in no case lie for an unredeemed pawn, however much the bailment of it may have been abused, we are not at liberty to apply the ratio decidendi in Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, to the case before us.

It raises a strong presumption against the defence set up in this plea, that nothing bearing the slightest resemblance to the right of possession, which it claims for the assignee of a pawnee, is to be found in the copious title of the digest, Dig. lib. 20 tit. 1, 'De pignoribus et hypothecis; et qualiter ea contrahantur, et de pactis eorum,' or in the five following titles of the contract of pawn and hypothec and its incidents, or in the title 'De pigneratitia actione, vel contra,' Dig. lib. 13, tit. 7, or in the works of any English, French, or Scotch jurist.

The dictum of the majority of the court in the case of Mores *v.* Conham, Owen, 123, 124, that the pawnee has such an interest in the pawn as he may assign over, was not the point decided in that case, nor, as it seems to me, a point essential to its decision; the point decided being that the surrender by the plaintiff of a chattel pawned to him by a third person was a good consideration for a promise by the defendant to pay the debt for which it had been given as security. It does not seem to follow from that decision that the surrenderee thereby acquired such an interest in the pawn as would enable him to defend an action of detinue at the suit of the true owner, the reunion of whose rights of property and possession was, unless they meant to rob him, the real object of the transaction. The inference drawn from this very obscure and superficially reasoned case in favor of the defendant's plea is wholly irreconcilable with the doctrine of Domat, the highest authority on all questions depending, as this question does, upon the rules and principles of the Roman civil law, that the bailments of 'hypothèque' and 'gage' last only as long as the thing hypothecated is in the hands of the person charging it, or the thing pawned in the hands of him who takes it for his security, Domat, Lois Civiles, liv. 3, tit. 1, § 1, and with the doctrine of Erskine, a jurist of nearly equal eminence, that 'in a pledge of movables the creditor who quits the possession of the subject loses the *real right* he had upon it.' Institutes of the Laws of Scotland, b. 3, tit. 1, § 33.

I think that the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea; that both of them have been guilty of a conversion; that the plaintiff might, as Mr. Justice Williams said in the case of Johnson *v.* Stear, 15 C. B. N. S. at p. 341, 33 L. J. C. P. at p. 134, lawfully, should the opportunity offer, resume the possession of the debentures, and hold them freed from the bailment, and may, the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill, recover them, or their full value, if they cannot be delivered to him, in this action of detinue.

Mellor, J. [after stating the declaration and plea]. — To this plea the plaintiff demurred; and upon demurrer I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before the default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson. The question thus raised by this plea is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by repledging such debentures and depositing them with a third person as a security for a larger amount, before any defaulting payment by the pawnor, make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. If the affirmative of this proposition be maintained, the result seems prima facie to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this court must give effect to

them. There is a well-recognized distinction between a *lien* and a *pledge*, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an agreement of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods to secure the payment of money at a certain day, on default by the pawnor the pawnee may sell the goods deposited and realize the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. It is said by Mr. Justice Story on Bailments, tit. Pawns or Pledges, § 311, that 'the foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances.' The question thus arises, Is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit, by way of pledge for securing the due payment of money, than in the incidental power of sale in the latter case on condition broken? In other words, on a contract of pledge, it is implied that the pledgee shall not part with the possession of the thing pledged until default in payment; and, if so, is that of the essence of the contract, *so that the violation of it makes void the contract?*

In the case of Legg *v.* Evans, 6 M. & W. 36, 41, an action of trover having been brought against the defendants, as sheriffs of Middlesex, to recover the value of some pictures and picture-frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied setting up a lien in respect of work done upon such goods and chattels, which had been

delivered to him in the way of his trade by one Williams, and further set up an agreement between the plaintiff and Williams that the plaintiff should draw and indorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and he alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea; and Parke, B., is reported to have said: 'If we consider the nature of a lien and *the right* which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a *personal right* which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a personal interest in the goods.' And farther on he said, 'Here the interest cannot be transferred to any other individual; it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant.' In that case there was superadded to the lien in respect of work done an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right 'to hold' to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and indorsed by him. It is, therefore, an authority to the effect that in the case of lien, even to secure payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and a right to hold by way of lien to secure the

same object. In Pothonier *v.* Dawson, Holt, N. P. at p. 385, cited in argument in Legg *v.* Evans, 6 M. & W. at p. 40, Gibbs, C. J., said, 'Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are *deposited by way of security*, to indemnify a party against a loan of money, it is more than a pledge. [Quære, whether 'pledge' should not be read 'lien.'] The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade.'

It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words 'special property,' as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In Legg *v.* Evans, 6 M. & W. at p. 42, the nature of a lien is defined to be a 'personal right which cannot be parted with;' but 'the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation.' Story on Bailments, § 311. In each case the *general property remains in the pawnor;* but the question is as to the nature and extent of the interest or special property passing to the bailee in the two cases. Mr. Justice Story, in his Treatise on Bailments, § 324, thus describes the right and interest of the pawnee: 'He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the

pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee.'

In M'Combie *v.* Davies, 7 East, 5 (see pp. 6 and 7), it appeared that a broker had for a debt of his own pledged with the defendant certain tobacco of his principals, upon which he had a lien; and in an action brought by the principal against the defendant in trover for the tobacco, Lord Ellenborough being of opinion 'that the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal,' the plaintiff obtained a verdict; and upon motion for a new trial Lord Ellenborough said that 'nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods;' but he afterwards added 'that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own*, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods on which he has the lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him.'

It would therefore seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet where he pledged the goods on which he had a lien tortiously, neither the factor nor his pawnee could retain them even for the payment of the amount of the original lien. The case of M'Combie *v.* Davies, 7 East, 5 (see pp. 6 and 7), shows that the factor's or broker's lien, although simply a right to retain possession as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign it only as a security to the like

amount as that due to himself. Still the character of the transaction is that of lien, and not of deposit, by way of pledge; and although the goods were intrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them; and, if he did, the act was an essential violation of the relation betwixt him and his principal, and entitled the latter at once to the recovery of the value of the goods in trover. 'But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee,' as was said by the court in Smart *v.* Sandars, 3 C. B. at pp. 400, 401; and see s. c. after amendment of pleadings, 5 C. B. at p. 917.

There would therefore appear to be some real difference in the incidents between a simple lien, like that in Legg *v.* Evans, 6 M. & W. 36, and the lien of a broker or factor before the Factors Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage. Notes to Coggs *v.* Bernard, 1 Smith's L. C. 194 (5th ed.). A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident, that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, 'appointing him as his servant to keep possession for him.' In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the mean time part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right of possession in the pawnor; but, in the absence of such terms, why are

they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us, we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130, one Cumming, a bankrupt, had deposited with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for £62 10*s*., discounted by the defendant, and which would become due January 29, 1863; and in case such acceptance was not paid at maturity, the defendant was to be at liberty to sell the brandy, and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of *trover*, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner in selling; and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendee in pursuance of such sale, he 'interfered with the right which the bankrupt had on the 29th, if he repaid the loan;' but the majority of the court (Erle, C. J., Byles and Keating, JJ.) held, that the plaintiff was only entitled to nominal damages, on the express ground that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default

on that day, created '*an interest and a right of property in the goods, which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods* under that contract.' See 15 C. B. N. S. at pp. 334, 335; 33 L. J. C. P. at p. 131. From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground 'that the bailment was terminated by the sale before the stipulated time, and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place.' See 15 C. B. N. S. at p. 340; 33 L. J. C. P. at p. 134. Although the dissent of that most learned judge diminishes the authority of that case as a decision on the point, and although it may be open to doubt whether in an action of *trover* the defendant ought not to have succeeded on the plea of not possessed, and whether the plaintiff's only remedy for damages was not by action on the contract, I am, nevertheless, of opinion that the substantial ground upon which the majority of the court proceeded, viz., that the 'act of the pawnee did not annihilate the contract, nor the interest of the pawnee in the goods,' is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of *lien*, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet if, nevertheless, he does pledge the goods to a third person for a greater interest than he possesses, such an act does not *annihilate the contract of pledge* between himself and the pawnor, but that the transaction is simply inoperative as against the original pawnor, *who upon tender of the sum secured immediately becomes entitled to the possession of the goods*, and can recover in an

action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods; and I think that such is the true effect of Lord Holt's definition of a 'vadium or pawn' in Coggs *v.* Bernard, 2 Ld. Raym. at pp. 916, 917. Although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrong-doer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to determine this case in favor of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been made by the plaintiff; and, considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question.

I am, therefore, of opinion that our judgment should be for the defendant.

Blackburn, J. [after stating the pleadings]. — The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonor of the bill of exchange; and as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonored, and consequently at a time when Simpson was not yet entitled by virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures, and no more. We must, I

think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay, the bill would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and so the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither having paid nor tendered the amount for which he had pledged them with Simpson. In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him; and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures.

The question, therefore, raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated in the plea, put an end to that interest and right of detention till the bill of exchange was honored, which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention; and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent to

which the factor was in advance, proceed on this ground. In Daubigny *v.* Duval, 5 T. R. at p. 606, Buller, J., puts the case on the ground that 'a lien is a personal right, and cannot be transferred to another.' In M'Combie *v.* Davies, 7 East, at p. 6, Lord Ellenborough puts the decision of the court on the same ground, saying that 'nothing could be clearer than that liens were personal, and could not be transferred to third persons by any tortious pledge of the principal's goods.' Story, in his Treatise on Bailments, §§ 325, 326, and 327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the legislature has intervened, and in all cases of pledges by agents, within the Factors Acts, the pledge is now available to the extent of the factor's interest.

But, on the facts stated on the plea, Simpson was not an agent within the meaning of the Factors Acts; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien properly so called, an interest in the property, or real right, as distinguished from a mere personal right of detention. I think that, both in principle and on authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by actual delivery of the thing), does give the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though there was no actual delivery of the possession; but the right of hypothec is not recognized by the common law. Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself. Howes *v.* Ball, 7 B. & C. 481. I mention this

because in the argument several authorities, which only go to show that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property.

The effect of the civil law is thus stated by Story, in his Treatise on Bailments, § 328: 'It enabled the pawnee to assign over, or to pledge the goods again, to the extent of his interest or lien on them; and in either case the transferee was entitled to hold the pawn, until the original owner discharged the debt for which it was pledged. But beyond this the (second) pledge was inoperative, and conveyed no title, according to the known maxim, nemo plus juris ad alium transferre potest quam ipse haberet.'

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the court in Mores *v.* Conham, Owen, 123, 124, where the court say that the pawnee is responsible 'if he misuseth the pawn; also he hath such interest in the pawn as he may *assign over*, and the *assignee* shall be subject to detinue if he detains it *upon payment of the money* by the owner.' It is true that one judge, Foster, J., dissented on this very point. That may so far weaken the authority of the decision; but it shows that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord Holt, in his celebrated judgment in Coggs *v.* Bernard, 2 Ld. Raym. at p. 916, that a pawnee 'has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him,' language certainly seeming to indicate an opinion that he has an interest in the thing, a real right, as distinguished from a mere personal right of detention. And Story, in his Treatise on Bailments, § 327, says: 'But whatever doubt may be indulged as to the case of a factor, it has been decided,' that is, in America, 'that in case of a

strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged.'

In Whitaker on Lien, published in 1812, p. 140, the law is laid down to be that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as showing that this was an existing opinion in England before Story wrote his treatise. But there is a class of cases in which a person having a limited interest in chattels, either as a hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest; so that it must be taken from his doing it that he had renounced the contract, which, as was said in Fenn *v.* Brittleston, 7 Ex. at p. 160, 21 L. J. Ex. at p. 43, operates as a disclaimer at common law; or as it is put by Williams, J., in Johnson *v.* Stear, 15 C. B. N. S. 330, 341, 33 L. J. C. P. 130, 134, he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being wholly at variance with the purpose for which he holds them, it may well be said that he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case, and recover the damage which he actually sustained, which may in such cases be very trifling, though it may be large, instead of holding that he might bring trover, and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant

to holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon. But where the act, though unauthorized, is not so repugnant to the contract as to show a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to ride from Gravesend to Nettlested deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and, although he misbehaved by riding to another place than was intended, that was to be punishable by an action on the case, and not by seizing the gelding. Lee *v.* Atkinson, Yelv. 172. This certainly was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to show a renunciation of the contract with the owner of the horse. Now I think that the sub-pledging of goods, held in security for money, before the money is due, is not in general so inconsistent with the contract as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the mean time the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a sub-pledge; at least, the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so long, at least, as it purports to transfer no more than the pledgee's interest against the pledgor) in so far from being found in practice

to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Act, and is in the civil law (and according to Mores *v.* Conham, Owen, 123, in our law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of Bloxam *v.* Sanders, 4 B. & C. 941, and Milgate *v.* Kebble, 3 M. & G. at p. 103, are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor, who irregularly sells the goods which have only been partially paid for, is very analogous to that of a pledgee; and in Milgate *v.* Kebble, 3 M. & G. at 103, Tindal, C. J., is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.

But the latest case, and one which I think is binding on this court, is that of Johnson *v.* Stear, 15 C. B. N. S. 330, 33 L. J. C. P. at p. 130; and I think that the decision of the majority of the Court of Common Pleas in that case is an authority that at all events there remains in the pawnee an interest, not put an end to by the unauthorized transfer, such as is inconsistent with a right in the pawnor to recover in detinue. In that case the goods had been pledged as a security for a bill of exchange, with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the *day before* he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods without any reduction. Williams, J., thought that they were so entitled, giving, as his reason, 'that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against the whole world.' 15 C. B. N. S. at p. 341; 33 L. J. C. P. at p. 134. And if this was correct, the present

plaintiff is entitled to judgment. But the majority of the court decided that 'the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and a right of property in the goods which was *more* than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, *nor the interest* of the pawnee in the goods under that contract.' 15 C. B. N. S. at pp. 334, 335; 33 L. J. C. P. at p. 131. This can be reconciled with the cases above cited, of which Fenn *v.* Brittleston, 7 Ex. 152, 21 L. J. Ex. 41, is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of Johnson *v.* Stear. It may be that the conclusion from these premises ought to have been that the defendant was entitled to the verdict, on the plea of not possessed in trover, unless the court thought fit to let the plaintiff, on proper terms, amend by substituting a count for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from Williams, J., shows that after consideration they *meant* to decide that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of Williams, J., I think we must, in a court of co-ordinate jurisdiction, act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground. And, as already intimated, I think that, unless the plaintiff is entitled to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.

MELLOR, J., read the judgment of

COCKBURN, C. J. — The question in this case is, whether,

when debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the depositee to sell or otherwise dispose of the debentures in the event of non-payment of the bill, — in other words, as a pledge, — and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and, without either paying or tendering the amount of the bill of exchange, for the payment of which the security had been pledged, bring an action of detinue to recover the thing pledged from the holder to whom it has been transferred.

I think it unnecessary to the decision in the present case to determine whether a party with whom an article has been pledged as a security for the payment of money has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged, — as in the case of a valuable work of art, — that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action, — for nominal damages, if

he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time.

It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end, until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him.

The view which I have taken of this case, and which I should have arrived at independently of authority, is fully borne out by the decision of the majority of the Court of Common Pleas in the case of Johnson *v.* Stear. There goods, which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, the court held, on an action of trover being brought to recover the goods, that, although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee, so as to entitle the owner to bring an action to recover the goods as if the contract never had existed. This decision appears to me to be a direct authority on the present case, and to be binding upon us. It is true that Mr. Justice Williams dissented from the other

three judges constituting the court, holding that the contract was put an end to, and the plaintiff remitted to his absolute right of ownership, by the conversion of the goods by the pawnee. But, however I may regret to differ from that very learned judge, I concur, for the reasons I have given, with the majority of the Court of Common Pleas in holding that a pawnor cannot recover back goods (and the same principle obviously would apply to debentures) pledged as security for the payment of a debt or bill of exchange, until he has paid or tendered the amount of the debt.

I am therefore of opinion that our judgment should be in favor of the defendant. *Judgment for the defendant.*

VIOLATION OF RIGHTS OF SUPPORT.

THURSTON *v.* HANCOCK.

Supreme Court of Massachusetts, March, 1815. 12 Mass. 220.

The owner of a house built near the line has no action for damage done to his house by an excavation made in the adjoining premises where the damage would not have resulted but for the weight of the house.

This was an action of the case, in which the plaintiff declares that long before the several grievances afterwards mentioned, and at the several times of committing the same, he was, and thence hitherto hath been, and still is, seised in fee of a certain messuage or dwelling-house and land, with the appurtenances, in Boston, which were in his possession and occupancy, and he had, and still ought to have, the full, safe, and secure use and enjoyment of the same; nevertheless, the defendants, well knowing the premises, but maliciously contriving and intending to hurt the plaintiff in this behalf, and to deprive him of the use and benefit of the said dwelling-house, on, &c., and on divers other days and times between that day and the day of suing his original writ in this behalf, at Boston aforesaid, wrongfully and injuriously took, dug, and carried away the earth, ground, and soil from the land next adjoining the plaintiff's said dwelling-house and land, to a great depth, that is to say, to the depth of sixty feet below the ancient surface of the said next adjoining land, and below the foundation of the plaintiff's said dwelling-house, and so near and so close to the said dwelling-house and land that the ground, earth, and soil of the plaintiff was undermined, and hath fallen away from around his said dwelling-house,

and from his land on which the same are situated; so that the cellar walls thereof have been left naked and exposed; by reason whereof the plaintiff hath been, and still is, greatly prejudiced and injured in his aforesaid estate, of and in the said dwelling-house and land, and the same is become of no value to him, and the said house hath been, and still is, in great danger of being thereby undermined and of falling down, and hath been thereby rendered wholly unsafe and insecure to dwell in, and of no use or benefit to the plaintiff, and by reason of the premises he hath been obliged to quit said house and to leave the same empty and untenanted, and been put to great trouble and expense, and hath been, and still is, deprived of all benefit, use, and enjoyment thereof, by means and on account of the premises. To his damage $20,000.

A trial was had upon the issue of not guilty, November term, 1813, and a verdict found for the defendants was to be set aside, and a new trial granted, if, in the opinion of the court, the plaintiff was entitled to maintain his action upon the following state of facts reported by the judge who sat in the trial, namely: that the plaintiff, in the year 1802, purchased a parcel of land upon Beacon Hill, so called, in Boston, bounded westwardly on land belonging to the town of Boston, on the said hill, eastwardly on Bowdoin Street, so called, and northwardly and southwardly on land of D. D. Rogers, Esq.; that afterwards, in the year 1804, the plaintiff erected a valuable brick dwelling-house thereon, which stood at the distance of forty feet from the northern and southern bounds of his land, the back side of the said house being about two feet from the western bounds of said land; that the foundation of said house was placed about fifteen feet below the ancient surface of the land; that the plaintiff, with his family, occupied the said house and land from the month of December, 1804, until they were obliged to remove therefrom, as hereafter mentioned; that the defendants commenced digging and removing the gravel from the side of the said hill in the year 1811; that on the

27th of July, 1811, the plaintiff gave them written notice that his house was endangered thereby; that the defendants, notwithstanding, continued to dig and carry away the earth and gravel from the hill, until the commencement of this action; that the only land belonging to the defendants, which adjoined to the said house and land of the plaintiff, was purchased by them of the town of Boston, and conveyed by deed dated the 6th of August, 1811; that the land thus bought by the defendants consisted of a lot about one hundred feet square, upon the top of said Beacon Hill, and a right in a highway thirty feet wide, leading to it from Sumner Street; that this lot and highway were laid out by said town more than sixty years since, for the purpose of erecting a beacon, and have never been used for any other purpose, except the erection of a monument; that the town derived its title to said land from long-continued possession for the purpose aforesaid; that all these facts were known to the defendants before they purchased said land of the town; that this land adjoined the plaintiff's house and land on the western side, and, at the time of suing out the plaintiff's writ, the defendants' digging and removal of the earth as aforesaid had approached, on the surface, within five or six feet of the plaintiff's house on the western side thereof, and in some places the earth had, by reason of said digging and removal, fallen from the walls thereof; that the defendants had dug and carried away the earth near the northwestwardly corner of said house to the depth of forty-five feet, and on the western side thereof to the depth of thirty feet, below the natural surface of their own, as well as of the plaintiff's land; that the earth dug and removed by the defendants as aforesaid was upon and from their said land next adjoining the plaintiff's land; that, by reason of the digging and removing of the earth as aforesaid, to the depth aforesaid, below the ancient surface of the earth, a part of the plaintiff's earth and soil, on the surface of his said land, had fallen away and slidden upon the defendants' land; and the foundation of the plain-

tiff's house was rendered insecure, and it became, and was, at the time of commencing this action, unsafe and dangerous to dwell in said house; and the plaintiff was obliged to quit and abandon the same, previous to his commencing this action, and afterwards to take it down in order to save the materials thereof.

Parker, C. J., for the court. — The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss; but, after all the researches we have been able to make, we cannot satisfy ourselves that the facts reported will maintain this action.

The plaintiff purchased his land in the year 1802, on the summit of Beacon Hill, which has a rapid declivity on all sides. In 1804, he erected a brick dwelling-house and outhouses on this lot, and laid his foundation, on the western side, within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession for more than sixty years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the 6th of August, 1811, the defendants purchased of the town the land situated westwardly of the said lot owned by the plaintiff; and, in the same year, commenced levelling the hill, by digging and carrying away the gravel; they not actually digging up to the line of division between them and the plaintiff, but keeping five or six feet therefrom. Nevertheless, by reason of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation wall bare, and so to endanger the falling of his house as to make it prudent and necessary, in the opinion of skilful persons, for the safety of the lives of himself and his family, to remove from the house; and, in order to save the materials, to take down the house, and to rebuild it on a safer foundation.

The defendants were notified of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages, in case of any loss.

The manner in which the town of Boston acquired a title to the land, or to the particular use to which it was appropriated, can have no influence upon the question, as the fee was in the town, without any restriction as to the manner in which the land should be used or occupied.

It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it.

The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own as not to injure the property or impair any actual existing rights of another. Sic utere tuo ut alienum non lædas. Thus, no man, having land adjoining his neighbor's which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbor's house, or expose it to injury from the weather or to unwholesome smells.

But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired. Therefore it is, that, by the ancient common law, no man could maintain an action against the owner of an adjoining tract of land, for interrupting the passage of the light or the air to a tenement unless the tenement thus affected was ancient, so that the plaintiff could prescribe for the privilege of which he had been deprived, upon the common notion of prescription, that there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued.

Now, in such case of a grant presumed, it shall for the purposes of justice be further presumed that it was from the

ancestor of the man interrupting the privilege, or from those whose estate he has; so as to control him in the use of his own property, in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common-law principle which gives one neighbor an action against another, for making the same use of his property which he has made of his own. And it is a reasonable principle; for it would be exceedingly unjust that successive purchasers or inheritors of an estate for the space of sixty years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted, or consented to, or acquiesced in, the use of the privilege.

It is true, that, of late years, the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than sixty years. But the same principle is preserved of the presumption of a grant. And, indeed, the modern doctrine, with respect to easements and privileges, is but a necessary consequence of late decisions, that grants and title-deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription.

The plaintiff cannot pretend to found his action upon this principle; for he first became proprietor of the land in 1802, and built his house in 1804, ten years before the commencement of his suit. So that, if the presumption of a grant were not defeated by showing the commencement of his title to be so recent, yet there is no case, where less than twenty years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued use of privileges, the full enjoyment of which necessarily trenches upon his neighbor's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one, which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house; and, indeed, they

could not have remained so long, without the culpable negligence or friendly acquiescence of those who might originally have had a right to hinder or obstruct them. But a man who himself builds a house adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land, and, by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience.

This seems to be the result of the cases anciently settled in England, upon the substance of nuisance or interruption of privileges and easements; and it seems to be as much the dictate of common sense and sound reason as of legal authority.

The decisions cited by the counsel for the plaintiff, 1 Domat, 309, 408; Fitz. N. B. 183; 9 Co. 59; Palmer, 536; 1 Roll. Abr. 140; ib. 430; Slingsby *v.* Barnard, 1 Roll. Rep. 88; 2 Roll. Abr. 565; 2 Saund. 697; Co. Lit. 56 *b;* 1 Burr. 337; 6 D. & E. 411; 7 East, 368; 1 B. & P. 405; 3 Wils. 461, in support of this action, generally go to establish only the general principle, that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil-law doctrine cited from Domat will be found, upon examination, to go no further than the common law upon the subject. For, although it is there laid down that new works on a man's ground are prohibited, provided they are hurtful to others who have a right to hinder them, and that the person erecting them shall restore things to their former state, and repair the damages, from whence, probably, the common-law remedy of abating a nuisance as well as recovery of damages, yet this is subsequently explained and qualified in another part of the same chapter, where it is said, that, if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title, or possession, he is not liable to damage for injurious consequences, unless he does it, not for his own advantage, but maliciously; and the damages shall be considered as casualties for which he is not answerable.

The common law has adopted the same principle, considering the actual enjoyment of an easement for a long course of years as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

The only case cited from common-law authorities, tending to show that a mere priority of building operates to deprive the tenant of an adjoining lot of the right of occupying and using it at his pleasure, without being subjected to damages, if by such use he should injure a building previously erected, is that of Slingsby *v.* Barnard, cited from Rolle. Sir John Slingsby brought his action on the case against Barnard and Ball, and declared that he was seised of a dwelling-house nuper edificatus, and that Barnard was seised of a house next adjoining; and that Barnard, and Ball under him, in making a cellar under Barnard's house, dug so near the foundation of the plaintiff's house, that they undermined the same, and one half of it fell. Judgment upon this declaration was for the plaintiff, no objection having been made as to the right of action, but only to the form of the declaration.

The report of this case is very short and unsatisfactory; it not appearing whether the defendant confined himself in his digging to his own land, or whether the house then lately built was upon a new or an old foundation. Indeed, it seems impossible to maintain that case upon the facts made to appear in the report, without denying principles which seem to have been deliberately laid down in other books, equally respectable as authorities.

Thus, in Siderfin, 167, upon a special verdict the case was thus: A, having a certain quantity of land, erected a new house upon part of it, and leased the house to B, and the residue of the land to C, who put logs and other things upon the land adjoining said house, so that the windows were darkened, &c. It was holden that B could maintain case against C for this injury. But the reason seems to be, that C took his lease seeing that the house was there, and that he should not, any more than the lessor, render the house

first leased less valuable by his obstructions. It was, however, decided in the same case, that, if one seised of land lease forty feet of it to A to build upon, and another forty feet to B to build upon, and one builds a house, and then the other digs a cellar upon his ground, by which the wall of the first house adjoining falls, no action lies; and so, they said, it was adjudged in Pigott & Surry's Case, for each one may make what advantage he can of his own. The principle of this decision is, that both parties came to the land with equal rights in point of time and title; and that he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident and provide against it by setting his house sufficiently within his line to avoid the mischief. In the same case it is stated, as resolved by the court, that, if a stranger have the land adjoining to a new house, he may build new houses, &c., upon his land, and the other shall be without remedy, when the lights are darkened; otherwise, when the house first built was an ancient one.

In Rolle's Abridgment, 565, A, seised in fee of copyhold estate, next adjoining land of B, erects a new house upon his copyhold land, and a part is built upon the confines next adjoining the land of B, and B afterwards digs his land so near the house of A, but on no part of his land, that the foundation of the house, and even the house itself, fall; yet no action lies for A against B, because it was the folly of A that he built his house so near to the land of B. For by his own act he shall not hinder B from the best use of his own land that he can. And, after verdict, judgment was arrested. The reporter adds, however, that it seems that a man, who has land next adjoining my land, cannot dig his land so near mine as to cause mine to slide into the pit; and, if an action be brought for this, it will lie.

Although, at first view, the opinion of Rolle seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position

of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor. For, in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest.

If this be the law, the case before us is settled by it; and we have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be.

The plaintiff purchased his land in 1802. At that time the inhabitants of Boston were in possession and the owners of the adjoining land now owned by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him. He could not have maintained an action for obstructing the light or air; because he should have known, that, in the course of improvements on the adjoining land, the light and air might be obstructed. It is, in fact, damnum absque injuriâ.

By the authority above cited, however, it would appear that for the loss of, or injury to, the soil merely, his action may be maintained. The defendants should have anticipated the consequences of digging so near the line; and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

HUMPHRIES *v.* BROGDEN.

Queen's Bench of England, Michaelmas Term, 1850. 12 Q. B. 739.

The owner of land is entitled to support from the subjacent strata; and, if the owner of minerals beneath removes them, it is his duty to leave sufficient support for the surface in its natural state.

This was an action against the Durham County Coal Company, sued in the name of their secretary. On the trial before Coleridge, J., at the Durham Spring Assizes, 1850, the jury, in answer to questions put by the learned judge, found the facts specially. His lordship then directed a verdict for the plaintiff, giving the defendants leave to move to enter a verdict for them upon the findings of the jury. Rule nisi. *Cur. adv. vult.*

Lord Campbell, C. J., for the court. — This is an action on the case. The declaration alleges that the plaintiff was possessed of divers closes of pasture and arable land, situate, &c., yet that the company, so wrongfully, carelessly, negligently, and improperly, and without leaving any proper and sufficient pillars or supports in that behalf, and contrary to the custom and course of practice of mining used and approved of in the country where the mines thereinafter mentioned are situate, worked certain coal-mines under and contiguous to the said closes, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, that, by reason thereof, the soil and surface of the said closes sank in, cracked, swagged, and gave way; and thereby, &c. The only material plea was not guilty.

The cause coming on to be tried before my brother Coleridge at the last spring assizes for the county of Durham, it appeared that the plaintiff was possessed of the closes described in the declaration, and that the Durham County

Coal Company (who may sue and be sued by their secretary) were lessees, under the Bishop of Durham, of the coal-mines under them; but there was no other evidence whatever as to the tenure or the title either of the surface or of the minerals. It appeared that the company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that, suposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly, or negligently, or contrary to the custom of the country. The jury found that the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports; and a verdict was entered for the plaintiff for £110 damages, with leave to move to enter a verdict for the defendant if the court should be of opinion that, under these circumstances, the action was not maintainable.

The case was very learnedly and ably argued before us in Easter and Trinity terms last. On account of the great importance of the question, we have taken time to consider of our judgment.

For the defendant it was contended that, after the special finding of the jury, the declaration is defective in not alleging that the plaintiff was entitled to have his closes supported by the subjacent strata. But we are of opinion that such an allegation is unnecessary to raise the question in this action, whether the company, although they did not work the mines negligently or contrary to the custom of the country, were bound to leave props to support the surface. If the easement which the plaintiff claims exists, it does not arise from any special grant or reservation, but is of common right, created by the law, so that we are bound to take notice of its existence. In pleading it is enough to state the facts from which a right or a duty arises. The carefully prepared declaration in Littledale *v.* Lord Lonsdale, H. Bl. 267, for disturbing the right of the owner of

the surface of lands to the support of the mineral strata belonging to another, contains no express allegation of the right; and, if the omission had been considered important, it probably would have been relied upon, rather than the objection that a peer of Parliament was not liable to be sued in the Court of King's Bench by bill.

We have, therefore, to consider, whether, when the surface of land (by which is here meant the soil lying over the minerals) belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state. This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by the erection of buildings; for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the globe subsisted in its present form.

Where portions of the freehold, lying one over another perpendicularly, belong to different individuals, and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But, in the case of adjoining closes which belong respectively to different persons from the surface to the centre of the earth, the law of England has long settled the degree of lateral support which each may claim from the other; and the principle upon which this rests may guide us to a safe solution of the question now before us.

In 2 Rolle's Abridgment, 564, tit. Trespass (1), pl. 1, it is said: 'If A, seised in fee of copyhold land next adjoining land of B, erect a new house on his copyhold land' (I may remark that the circumstance of A's land being copyhold is wholly immaterial), 'and part of the house is erected on the confines of his land next adjoining the land of B, if B afterwards digs his land near to the foundation of the house of A, but not touching the land of A, whereby

the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A against B, because this was the fault of A himself that he built his house so near to the land of B, for he could not by his act hinder B from making the most profitable use of B's own land. Easter Term, 15 Car. B. R., Wilde *v.* Minsterley. But semble that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie.' This doctrine is recognized by Lord C. B. Comyns, Com. Dig., Action upon the Case for a Nuisance (A); by Lord Tenterden, in Wyatt *v.* Harrison, 3 B. & Ad. 871, 876; and by other eminent judges. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, sic utere tuo ut alienum non lædas. As is well observed by a modern writer: 'If the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone.' Gale on Easements, p. 216.

This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed as much as after the expiration of twenty years, or any longer period. Pari ratione, where there are separate freeholds from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left;

but, if the surface subsides, and is injured by the removal of these strata, although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property; and under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule; and the attempt to introduce them would lead to uncertainty and litigation. Greater inconvenience cannot arise from this rule in any case than that which may be experienced where the surface belongs to one owner and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise to the parties and to the public.

Something has been said of a right to a reasonable support for the surface; but we cannot measure out degrees to which the right may extend; and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level.

The defendant's counsel have argued that the analogy as to the support to which one superficial close is entitled from the adjoining superficial close cannot apply where the surface and the minerals are separate tenements, belonging to

different owners, because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But, in contemplation of law, all property in land having been in the Crown, it is easy to conceive that, at the same time, the original grant of the surface was made to one, and the minerals under it to another, without any express grant or reservation of any easement. Suppose (what has generally been the fact) that there has been in a subject unity of title from the surface to the centre; if the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said that, if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the grantee from doing what he likes with his own: but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed; and a man must so use his own as not to injure his neighbor.

The books of reports abound with decisions restraining a man's act upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is, where the upper story of a house belongs to one

man, and the lower to another. The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant, why is not a similar grant or covenant to be implied in favor of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, conveying away the lower story only, is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?

I will now refer, in chronological order, to the cases which were cited in the argument; and I think that none of them will be found in any degree to impugn the doctrine on which our decision rests.

In Bateson *v.* Green, 5 T. R. 411, Buller, J., says: 'Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the question is, Which of the two rights is subservient to the other?' And it was held that the lord may dig clay-pits on a common, or empower others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been always exercised by the lord. So, here, the right of the owner of the minerals to remove them may be subservient to the right of the owner of the surface to have it supported by them.

Peyton *v.* The Mayor, &c., of London, 9 B. & C. 725, was cited to show the necessity for introducing into the declaration an averment that the plaintiff was entitled to the easement or right which is the foundation of th action: but the easement there claimed was a right of support of one building upon another, which could arise only from a grant, actual or implied; and there Lord Tenterden says: 'The declaration in this case does not allege as a fact that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allega-

tion from which a title to such support can be inferred as a matter of law.' In the case at bar, we are of opinion that the declaration alleges facts from which the law infers the right of support which the plaintiff claims.

Wyatt *v.* Harrison, 3 B. & Ad. 871, decided that the owner of a house, recently erected on the extremity of his land, could not maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down; but the reason given is, that the plaintiff could not, by putting an additional weight upon this land, and so increasing the lateral pressure upon the defendant's land, render unlawful any operation in the defendant's land which before would have caused no damage; and the court intimated an opinion that the action would have been maintainable, not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years. Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house. Stansell *v.* Jollord, 1 Selw. Ni. Pri. 457 (11th ed.), and Hide *v.* Thornborough, 2 Carr. & Kir. 250. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle.

In Dodd *v.* Holme, 1 A. & E. 493, where there is a good

deal of discussion respecting the rights of owners of adjoining lands or houses, no point of law was determined, as the case turned upon the allegation in the declaration that the defendants dug 'carelessly, negligently, unskilfully, and improperly,' whereby 'the foundations and walls' of the plaintiff's house gave way. The plaintiff's house was proved to have been in a very bad condition; but Lord Denman said that the defendant had no right to accelerate its fall.

The Court of Exchequer, in Partridge *v.* Scott, 3 M. & W. 220, concurred in the law before laid down in this court, that a right to the support of the foundation of a house from adjoining land belonging to another proprietor can only be acquired by grant, and that, where the house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant; but nothing fell from any of the judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's, not covered with buildings, had likewise sunk, in consequence of the defendant's operations in his own land; but the court, in directing a verdict to be entered for the defendants on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the house, or would not have taken place if his own land had not been excavated.

The judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas, in Chadwick *v.* Trower, 6 New Ca. 1 (see Trower *v.* Chadwick, 3 New Ca. 334), that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall which rests upon it, and that he is not even liable for carelessly pulling down his wall, if he had not notice of the existence of the adjoining wall; but this decision proceeds upon the want of any allegation or proof of a right of the

plaintiff to have his wall supported by the defendant's, and does not touch the right or obligation of conterminous proprietors, where the tenement to be supported remains in its natural condition.

Next comes the valuable case of Harris *v.* Ryding, 5 M. & W. 60, which would be a direct authority in favor of the present plaintiff if it did not leave some uncertainty as to the effect of the averment in the declaration, of working 'carelessly, negligently, and improperly,' and as to whether the plaintiff was considered absolutely entitled to have his land supported by the subjacent strata, to whatever degree the affording of this support might interfere with the defendant's right to work the minerals. There one seised in fee of land conveyed away the surface, reserving to himself the minerals, with power to enter upon the surface to work them; and it is said to have been held that, under this reservation, he was not entitled to take all the minerals, but only so much as 'could be got, leaving a reasonable support to the surface,' p. 70. The case was decided upon a demurrer to certain pleas justifying, under the reservation, and the declaration alleged careless, negligent, and improper working, which there must be considered as admitted, whereas here it is negatived by the verdict; but the barons, in the very comprehensive and masterly judgment which they delivered seriatim, seem all to have thought that the reservation of the minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them. Lord Abinger says: 'The plea is no answer, because it does not set forth any sufficient ground to justify the defendant in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them.' Parke, B., observes: 'It never could have been in the contemplation of the parties that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal and let down the surface or

injure the enjoyment of it;' and again: 'This plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then state.' 'The question is,' says Alderson, B., 'whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode in which he would be authorized to get them, provided he leaves a proper support for the land which the other party is to enjoy?' My brother Maule, then a judge of the Court of Exchequer, says, in the course of his luminous judgment: 'The right of the defendants to get the mines is the right of the mine-owners as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land.' Parke, B., that he might not be misunderstood as to the right of the owner of the surface, afterwards adds: 'I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support.' It seems to have been the unanimous opinion of the court that there existed the natural easement of support for the upper soil from the soil beneath, and that the entire removal of the inferior strata, however skilfully done, would be actionable, if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed.

The counsel for the defendant cited and relied much upon the case of Acton *v.* Blundell, 12 M. & W. 324, in which it was held that a landowner, who, by mining operations in his own lands, diverts a subterraneous current of water, is not liable to an action at the suit of the owner of the adjoining land, whose well is thereby laid dry. But the right to running water and the right to have land supported are so totally distinct, and depend upon such different principles,

that there can be no occasion to show at greater length how the decision is inapplicable.

We have now to mention the case of Hilton *v.* Lord Granville, 5 Q. B. 701. A writ of error may probably be brought in this case,[1] when all the issues of fact have been disposed of; and nothing which I now say is to preclude me from forming any opinion upon it, should I ever hear it argued. If well decided, the plaintiff is justified in relying upon it; for it is strongly in point. This court there held that a prescription or a custom within a manor for the lord, who is seised in fee of the mines and collieries therein, to work them under any dwelling-house, buildings, and lands, parcel of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation for the use of the surface of the lands, but without making compensation for any damage occasioned to any dwelling-houses or other buildings within or parcel of the manor by or for the purpose of working the said mines and collieries, is void as being unreasonable. Lord Denman, C. J., said: 'A claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument.'

The most recent case referred to was Smith *v.* Kenrick, 7 C. B. 515, 564, in which the Court of Common Pleas, after great deliberation, held that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine, as far as the flow of water is concerned, in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so that such

[1] See 12 Q. B. 737, note.

prejudice does not arise from the negligent or malicious conduct of his neighbor. But no question arose there respecting any right to support; the controversy being only respecting the obligation to protect an adjoining mine from water which may flow into it by force of gravitation. And in the very learned judgment of the court, delivered by my brother Cresswell, there is nothing laid down to countenance the doctrine that, in a case circumstanced like this which we have to determine, the owner of the minerals may, if not chargeable with malice or negligence, remove them so as to destroy or damage the surface over them which belongs to another.

We have attempted, without success, to obtain from the codes and jurists of others information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined where we discover the right of adjoining proprietors of lands to support from lateral pressure leading to such minute regulations as the following: 'Si quis sepem ad alienum praedium fixerit, infoderitque, terminum ne excedito: si maceriam, pedem relinquito: si vero domum, pedes duos: si sepulchrum aut scrobem foderit, quantum profunditatis habuerint, tantum spatii relinquito: si puteum passus latitudinem.' Dig. lib. x., tit. 1 (Finium regundorum), l. 13.

The Code Napoleon likewise recognizes the support to which the owners of adjoining lands are reciprocally entitled, but contains nothing which touches the question for our decision more closely than the following article on 'Natural Servitudes.'[1] 'Les fonds inférieurs sont assujettis, envers ceux qui sont plus élevés, à recevoir les eaux

[1] 'Servitudes qui dérivent de la situation des lieux.'

qui en découlent naturellement sans que la main de l'homme y ait contribué.' 'Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur.' Code Civil, liv. 2, tit. iv. ch. 1, art. 640. But reference is here made to adjoining fields on a declivity, not to the surface of land and the minerals being held by different proprietors.

The American lawyers write learnedly on the support which may be claimed for land from lateral pressure and for buildings which have long rested against each other, but are silent as to the support which the owner of the surface of lands may claim from the subjacent strata when possessed by another. See Kent's Commentaries, part vi. lecture liii. vol. iii. p. 434, ed. 1840.

However, in Erskine's Institutes of the Law of Scotland, treating of the servitude Oneris ferendi, the very learned author has the following passage, which well illustrates the principle on which our decision is founded: —

'Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh,' 'the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight.' 'The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower.' Book ii. tit. 9, s. 11, vol. i. p. 433 (Ivory's ed. 1828).

For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines; and that the rule to enter a verdict for the defendant must be discharged. We need hardly say that we do not mean to lay down any rule applicable to a case where the prima facie rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title-deeds or by other evidence. *Rule discharged.*

VIOLATION OF WATER RIGHTS.

SPRINGFIELD *v.* HARRIS.

Supreme Court of Massachusetts, September, 1861. 4 Allen, 494.

The owner of land over which a natural stream of water flows has a right to the reasonable use of the water for mills, whatever the effect upon the owners of lands below.

Tort by the City of Springfield for the obstruction of a natural stream of water by means of a dam.

At the trial in the Superior Court, before Vose, J., there was evidence to show the uses which the plaintiffs have heretofore made of the water of the stream, where it crosses Main Street in the city of Springfield, below the defendant's land, and the method in which the defendant has used and obstructed the same; and it was a question in dispute whether the plaintiffs had established a title to Main Street. Upon the evidence in respect to the latter question, the facts not being denied, the judge ruled that the plaintiffs had not made out their title, and he directed the jury to return a verdict for the defendant, and also to answer the two following questions: '1. Is the dam of the defendant of such magnitude as is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein? 2. Is the mode of using the dam by the defendant, by closing the gate at night for the purpose of letting the pond fill, an unusual and unreasonable use, according to the general custom of the country in cases of dams upon similar streams?' The judge instructed the jury that, in answering these questions, they were to decide as practical men, upon

the evidence in the case, with their judgments aided by the testimony of the experts, and the evidence relative to the general usage or custom of the country, or to dams upon similar streams, and by their own view of the premises, and that they were not to take into view the rights claimed by the plaintiffs in determining the facts involved in these inquiries.

The plaintiffs made no objections to these instructions, and did not ask for any others; and the jury answered the first question in the affirmative, and the second in the negative.

To the ruling of the judge directing the jury to return a verdict for the defendant, the plaintiffs alleged exceptions.

Merrick, J., for the court. — It appears from the pleadings, and from the facts stated in the bill of exceptions, that Garden Brook is a natural stream running by and over the land of the defendant, and thence through Main Street in the city of Springfield. The plaintiffs claim to be owners in fee of all the land included within the limits of said street, and that they are entitled to have the water flow in said stream at all times without obstruction, in order that they may use it, as they have a right to do, for sewerage, for extinguishing fires, and for all other purposes essential to the health and safety of the city. The defendant is the owner and occupant of a mill standing upon his said land; and he admits that during the whole period in which the obstruction complained of is alleged to have occurred, he has, in operating his mill and the works contained in it, used the water of said stream by means of a dam, which for that purpose he has erected and maintained across it. The plaintiffs in their declaration allege that this dam was and is ' of a larger magnitude than is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein.' And this is the particular grievance of which they complain, and which they set forth as their cause of action against the defendant.

The action can be maintained only by the proof of this material allegation; for the defendant had a right to use the water in a reasonable and lawful manner to work and operate his mill, whatever might be the effect of such use, in reference to any easement to which proprietors of land situate at any point below it might otherwise be entitled. Each proprietor of land through which a natural watercourse flows has a right as owner of such land, and as inseparably connected with and incident to it, to the natural flow of the stream for any hydraulic purpose to which he may think fit to apply it; and it is a necessary consequence from this principle that such proprietor cannot be held responsible for any injurious consequences which result to others, if the water is used in a reasonable manner, and the quantity used is limited by, and does not exceed, what is reasonably and necessarily required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream and the quantity of water usually flowing therein. Thurber *v.* Martin, 2 Gray, 394; Gould *v.* Boston Duck Co., 13 Gray, 442; Tourtellot *v.* Phelps, 4 Gray, 376.

The jury having found, under instructions in matter of law which are admitted to have been correct and unobjectionable, that the plaintiffs have failed to establish the material allegations in their declaration relative to the dam erected and maintained by the defendant across the stream, and having also found that the said dam is only of such magnitude as is adapted to the size and capacity of the stream and to the quantity of water usually flowing therein, and that the manner in which he used the water was not an unusual or unreasonable use of it, according to the general custom of the country in cases of dams upon similar streams, it is obvious that the plaintiffs were not entitled to recover any damages, and therefore that the verdict was properly rendered for the defendant.

It is objected that the court erred in ruling that the plaintiffs had not upon the evidence shown that they had acquired

any prescriptive right to the water in the brook, and in directing the jury for that reason to return a verdict for the defendants. It would have been more regular to reserve these directions, which were predicated wholly upon questions of law, and to submit to the jury the questions of fact in issue, which were specially submitted to them with instructions that if they found the first in the affirmative and the second in the negative, they should in that case render a verdict for the defendant. But as we do not perceive that the plaintiffs were at all prejudiced or subjected to any disadvantage by the course pursued, such irregularity affords no sufficient cause for disturbing the verdict, which was rendered exclusively upon particular questions of fact which were wholly independent of and distinct from the questions of law. And as the finding of the jury upon those particular questions makes it certain that the plaintiffs could in no event maintain their action, it becomes unnecessary to consider whether the ruling of the court in relation to the plaintiffs' alleged title was correct; for whether they owned the soil, or had acquired any prescriptive right to the use of the water, or were mere riparian proprietors, it is obvious that judgment must necessarily, upon the finding of the jury upon those questions of fact, be rendered for the defendant. *Exceptions overruled.*

ELLIOT *v.* THE FITCHBURG RAILROAD COMPANY.

Supreme Court of Massachusetts, October 1852. 10 Cush. 191.

One riparian proprietor cannot maintain an action against an upper proprietor for a diversion of part of the water of a natural watercourse flowing through their lands, unless such diversion causes the plaintiff actual perceptible damage.

This action was tried in this court, at the October term, 1849, before Metcalf, J., under whose rulings a verdict was

found for the defendants. The plaintiff excepted to the rulings and instructions, which, with the facts of the case, sufficiently appear in the opinion.

Shaw, C. J., for the court. — This is an action of the case against the defendants, for diverting the water of a small brook, passing through land of the plaintiff in Shirley. The facts are briefly these: The plaintiff is the owner of certain land, and for more than sixty years a small brook, having its sources in several ponds, has, in its natural course, flowed through lands of various persons, viz., of one Clark, of one Furnin, and then through the plaintiff's land, which is about half a mile below said Clark's, and from the plaintiff's land, through various other lands, to Nashua River. Said brook was in part supplied by a never-failing spring, on said Clark's land, near said brook, and having its outlet into it. The defendants, pursuant to a warranty deed from said Clark, of a perpetual right and privilege to make and maintain a dam and reservoir, and draw and use the water therefrom, erected such dam across said stream, below said spring, and made said reservoir upon and about the same, and inserted a lead pipe therein, by means of which they have used and constantly taken water, from said reservoir, to their depot in Shirley, and used the same for furnishing their locomotive steam-engines with water, and for other similar purposes. The defendants offered evidence tending to prove that said Clark, where said brook runs through his meadow, which is wet and springy, had cut ditches across the meadow to the brook, thereby increasing the flow of water to the brook; and it was further proved that there is no outlet for the water of said meadow, except into this brook. The meadow is situate below the dam.

The plaintiff contended that if the jury were satisfied of the existence of the brook, as alleged, and the diversion of the water therefrom by the defendants, he was entitled to a verdict for nominal damage, without proof of actual damage. But the presiding judge instructed the jury that unless the

plaintiff suffered actual perceptible damage in consequence of the diversion, the defendants were not liable in this action. In connection with this instruction, the judge further instructed the jury that if they believed that the defendants, by excavating said reservoir and spring above the dam, or that said Clark, by digging said ditches, had increased the flow of water in said brook, equal to the quantity of water the defendants had diverted therefrom, then the defendants were not liable in this action.

The whole court are of opinion that this direction was right in both particulars.

This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it, and regulate the rights of riparian proprietors, through and along whose lands it passes, as are held to apply to other watercourses, subject to this consideration, that what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream, just sufficient to furnish water for domestic uses for farmyards, and watering-places for cattle.

The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in watercourses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below, on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right.

The right to flowing water is now well settled to be a right incident to property in the land; it is a right publici juris, of such character that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of

it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or maufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is therefore, to a considerable extent, a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes.

It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. But this, we think, is an abstract question which cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of

buckets or a pump — for the mode is not material — to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which, in its ordinary operation, will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such, that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, whilst the other would nearly deprive him of the whole beneficial use, and yet, in both, the water would be used for irrigation. We cite a few of the leading cases in Massachusetts on this subject. Weston *v.* Alden, 8 Mass. 136; Colburn *v.* Richards, 13 Mass. 420; Cook *v.* Hull, 3 Pick. 269; Anthony *v.* Lapham, 5 Pick. 175.

This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors. Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration, or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper proprietor for taking any portion of the water of the stream for any purpose; such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor in entering the close of the upper to abate it. Colburn *v.* Richards, 13 Mass. 420.

It would also follow, as the legal and practical result, that no proprietor could have any beneficial use of the stream, without an encroachment of another's right, subjecting him to actions toties quoties, as well as to a forcible abatement of the nuisance. If the plaintiff could, in a case like the present, have such an action, then every proprietor on the brook, to its outlet in Nashua River, would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimack River to the ocean. This is a sort of reductio ad absurdum, which shows that such cannot be the rule, as was claimed by the plaintiff.

Without intending at present to state the authorities fully, we refer to the following English cases, as tending to illustrate and fix the rule as stated: Bealey *v.* Shaw, 6 East, 208; Duncombe *v.* Randall, Hetley, 32; Williams *v.* Morland, 2 B. & C. 910; 4 Dow. & Ry. 583; Wright *v.* Howard, 1 Sim. & Stu. 190.

If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below, by diminishing the value of his land, though at the time he has no mill or other work to sustain present damage, still, if the party thus using it has not acquired a right by grant, or by actual appropriation and enjoyment twenty years, it is an encroachment on the right of the lower proprietor, for which an action will lie. Mason *v.* Hill, 3 B. & Ad. 304; 5 B. & Ad. 1; Wood *v.* Waud, 3 Welsby, Hurlst. & Gord. 748. But the doctrine is much discussed and settled on deliberation, in a recent case decided in the Court of Exchequer. Embrey *v.* Owen, 6 Welsby, Hurlst. & Gord. 353.

The right to the use of flowing water is publici juris, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to

a similar right in all the proprietors to the reasonable enjoyment of the same gift of Providence. It is therefore only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie; but for such deprivation or unwarrantable use an action will lie, though there be no actual present damage. So it is subsequently stated in the close of the case last cited: 'so long as this reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie.'

We think the most reliable American authorities are to the same effect. 3 Kent Com. (6th ed.) 439; Angell on Watercourses, ch. iv.; Blanchard *v.* Baker, 8 Greenl. 253; Tyler *v.* Wilkinson, 4 Mason, 397; Webb *v.* Portland Manufacturing Co., 3 Sumner, 189; Anthony *v.* Lapham, 5 Pick. 175. The same doctrine has been held in a recent case in New York. Van Hoesen *v.* Coventry, 10 Barb. 518.

In applying these rules to the present case, we are to consider that Clark, who owned the land on which the dam was built, and the defendants to whom he conveyed all his right to the use of the water, as holding together the whole right; and it is to be considered in the same manner as if the defendants owned the land. We think it was properly left to the jury to find whether the defendants, claiming in the right of Clark had, by their diversion of the water for a valuable and highly beneficial use, caused any actual or perceptible damage, and, if not, to find for the defendants. It is very clear that here is no complaint of the total diversion of the stream from the plaintiff's land; no such ground of complaint is set forth or relied on. The bed of the stream and the stream itself remains and passes through the plaintiff's land as it did before. The gravamen of the complaint is not for diverting the stream itself, but for abstracting a part of the water of the stream. This is a right which each proprietor has, if exercised within a reasonable limit. The proper question therefore was, whether, in the mode of

taking, in the quantity taken, and the purpose for which it was taken, there was a reasonable and justifiable use of the water by Clark. The use being lawful and beneficial, it must be deemed reasonable, and not an infringement of the right of the plaintiff, if it did no actual and perceptible damage to the plaintiff; and therefore we think that question of fact was rightly left to the jury, who must have found that it did him no such damage.

We consider the other direction correct also, as we understand it. The question was not, if the defendants had caused a damage to the plaintiff, amounting in law to a disturbance of his right, for which an action would lie, whether it would be barred by an advantage of equal value, conferred in nature of a set-off; but whether, the improvements of Clark upon his meadow taken together as a whole including the dam and ditches as parts of one and the same improvement, any damage was done to the plaintiff; and this, we think, was correctly so left.

It may perhaps be proper to guard against misconstruction, in considering what are the general rights and duties of persons owning lands bounding on running streams, by the general rules of law and for general purposes, that some alterations of these rules may be effected in Massachusetts, by the acts of legislation on that subject, in respect to mills, and the construction which has been judicially put upon such legislative acts. This system originated with the provincial act, 13 Anne, passed in 1714, Ancient Laws and Charters 404. This act by its operation necessarily secures, to some extent, advantages to the prior occupant of a stream, by a dam erected to work a mill. Bigelow *v.* Newell, 10 Pick. 348; Bemis *v.* Upham, 13 Pick. 167; Baird *v.* Wells, 22 Pick. 312.

It is not necessary, however, now to go into this subject, but merely to say that the rights to streams of running water, upon which the present question turns, are not dependent upon or affected by the mill acts.

Exceptions overruled.

FRAZIER *v.* BROWN.

Supreme Court of Ohio, December, 1861. 12 Ohio St. 294.

Between adjoining landowners there are no correlative rights in regard to underground water percolating through the soil, except by contract or statute.

The plaintiff, now plaintiff in error, alleged in substance that he was at the time of the grievance complained of owner in possession of certain land, upon which, near his dwelling-house, there had been from time immemorial a valuable spring of water, from which a never-failing rivulet or stream of water had always flowed over his land; and that the defendant, an adjoining landowner, 'well knowing the premises, but contriving and wickedly intending to injure the plaintiff, and to destroy said spring and the stream of water issuing therefrom,' did in 1856, 'by means of a certain hole wickedly and maliciously dug' in the defendant's land adjoining, 'for the purpose of destroying said spring, and diverting the stream or rivulet . . . from running across . . . the aforesaid premises of the plaintiff,' destroy said spring and divert the water issuing therefrom away from the plaintiff's premises. To the plaintiff's damage, &c.

Demurrer to the foregoing sustained by the Court of Common Pleas, and judgment rendered for the defendant; to reverse which the plaintiff filed this petition in error, in a case reserved for the Supreme Court.

Brinkerhoff, J., for the court. — On approaching the questions presented by the demurrer to the petition in this case, and attempting to examine them in the light of the decisions which appear to have a bearing upon them, those decisions seem, at first, to involve no little contradiction and

uncertainty. But this seeming uncertainty and contradiction in the cases is owing to the want of a classification of the general subject into certain distinct branches of inquiry, into which the general subject naturally falls. When this classification is made, the seeming contradictions in the cases almost wholly disappear; and the cases drop in under the different heads of inquiry to which they properly belong, and assume a real and very satisfactory consistency with each other.

In considering the relative rights and obligations of owners of adjoining lands in respect to water passing from the lands of one to those of the other, the subject naturally divides itself into four branches of inquiry; and this on account of the four different modes in which water may, and sometimes does, pass from one tract of land to another.

1. In respect to surface streams which flow in a permanent, distinct, and well-defined channel from the lands of one owner to those of another.

2. In respect to surface waters — however originating — which without any distinct or well-defined channel, by attraction, gravitation, or otherwise, are shed and pass from the lands of one proprietor to those of another.

3. Subterranean streams which flow in a permanent, distinct, and well-defined channel from the lands of one to those of another proprietor.

4. Subsurface waters, which, without any permanent, distinct, or definite channel, percolate in mere veins, ooze, or filter from the lands of one owner to the lands of another.

The whole subject, in all its branches, is governed by two general and fundamental maxims: which are — first, that the estate, usufruct, and dominion of the owner of lands extend from the sky to the lowest depths of the earth; second, that every man shall so use his own as not to injure his neighbor. These maxims, however, like most general rules, are, in their application, subject to modifications or exceptions, growing out of certain great principles of natural right, anterior in their origin, and superior in their obliga-

tion, to all individual proprietorship; out of certain paramount considerations of public policy; and from the established principle, that, however great or obvious the damage may be, the law will regard as an injury that only which contravenes or interferes with a recognized legal right.

Thus 1, in regard to the branch of inquiry first abovenamed, to wit, surface streams flowing in a permanent, distinct, and definite channel, it is now too well settled to require the citation of authorities for its support, that notwithstanding the maxim which affirms the absolute and unlimited dominion of the proprietor of the soil upward and downward, the proprietor below has, in the absence of any modification of relative rights by contract or prescription, no right to throw the water back on him above, and has the right to receive it from the proprietor above substantially undiminished in quantity and uncorrupted in quality; and this right arises, not from any supposed grant or from prescription, but ex jure naturae, and for the reason that surface streams of flowing water are the gift of Providence, for the benefit of all lands through which they flow, and as such their usufruct is appurtenant to the lands through which they flow.

2. In respect to surface waters which, without any permanent, distinct, and definite channel, are shed, or, by any means pass, from the lands of one to those of another proprietor, — it seems now to be the established doctrine, that, unless some right derived from actual contract or positive legislation intervene, the doctrine which asserts the absolute dominion of proprietors applies to its full extent and without exception. Paramount considerations of public policy forbid the acquisition of any right in such waters by an adjoining proprietor on the ground of prescription. Otherwise than on the ground of actual contract or positive legislation, he can have no legal right in such waters; and whatever damage he may suffer by reason of the exercise of his neighbor's rightful command over his own soil, is damnum absque injuria. To this effect the cases are nearly uniform, and seem to rest on a broad and sound basis of reason

and policy. Rauston *v.* Taylor, 11 Exch. Rep. 369; Broadbent *v.* Ramsbotham, Id. 602; Luther *v.* Winnisimmet Company, 9 Cush. 171; Wheatley *v.* Baugh, 25 Penn. St. Rep. (1 Casey) 528. The only case that I can find which holds a contrary doctrine, is Balston *v.* Bensted, 1 Camp. 463. But that was a case at nisi prius, doubtless hastily decided, and which, in the later cases, has not been followed, or regarded as authoritative. Vide 30 BD. 108.

3. In respect to subsurface streams, which, though under ground, yet flow in a permanent, distinct, and well-defined channel unmixed with the earth through which they flow, such streams, it is notorious, are occasionally found to exist in various geological formations; though they are more abundant, both in frequency and volume, in limestone regions. As is said by Lewis, C. J., in Wheatley *v.* Baugh, above cited, 'In limestone regions streams of great volume and power pursue their subterranean courses for great distances, and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water, for all the purposes of life.' And he adds that 'when the filtrations are gathered into sufficient volume to have an appreciable value, and to flow in a clearly-defined channel, it is generally possible to see it, and to avoid diverting it without serious detriment to the owner of the land through which it flows;' and he expresses the opinion, that 'to say that these streams might be obstructed or diverted, merely because they run through subterranean channels, is to forget the rights and duties of man in relation to flowing water.' He is, evidently, of opinion that subterranean streams, as distinguished from subterranean percolations are governed by the same rules, and give rise to the same rights and obligations as flowing surface streams. But the case he was considering did not necessarily involve any question in reference to clearly-defined subterranean streams; and his opinion, therefore, though certainly entitled to great weight, as the opinion of a jurist who evidently has very thoroughly considered the general subject, and has

discussed it with great and comprehensive ability, can hardly be regarded as authoritative.

To this branch of inquiry, too, the case of Smith *v.* Adams, 6 Paige, 435, is clearly referable. That was a bill in Chancery, by an owner below, to restrain, by injunction, an owner above from diverting a portion of the water of a subterranean stream which, on the complainant's land, and a few feet from the line between the parties, issued from a channel in a ledge of slate rock, and there formed a spring; and which subterranean stream the defendant, on his own land, though but a few feet above where it issued on the complainants' land, had tapped, and, by means of an aqueduct of logs, had diverted a portion of its waters to his own purposes, and out of their natural channel. The Chancellor expressed the opinion that the partial diversion of the water of the underground stream was wrongful; but inasmuch as the small quantity of water diverted, and the trifling amount of damage done, brought the case within the rule of de minimis, he dismissed the bill, and left the complainant to his remedy at law.

Parke, B., in Dickinson *v.* The Grand Junction Canal Company, 9 E. L. & E. Rep. 521, also speaking of surface streams, says, 'When water is on the surface, the right of the owner of adjoining land to the usufruct of that water is not a doubtful matter of fact — it is public and notorious — and such a right ought, as a matter of course, to be respected by every one; and, indeed, if the course of a subterranean stream were well known — as is the case with many, which sink underground, pursue for a short space a subterranean course, and then emerge again — it never could be contended that the owner of the soil, under which the stream flowed, could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground.' And it will be observed that both Baron Parke and Chief Justice Lewis intimate the opinion, that, in order to bring subterranean streams within the rules

which govern surface streams, their existence and their course must be, to some extent, known or notorious. And it seems to me that, if the question should ever arise, the rights and obligations of adjoining proprietors would have to be subjected to this limitation; and this for the reason — which will be more fully noticed hereafter — that the law cannot properly limit the ordinarily absolute dominion of the owner of the soil, in respect to things concealed and hidden in the bowels of the earth, nor recognize an adjoining proprietor as having claims upon, or rights in, a thing passing under the surface of his neighbor's land, the existence of which was first revealed by the very act which would constitute the subject-matter of his complaint.

But all the opinions to which I have adverted under this head of the general subject, are obiter dicta; the questions considered did not necessarily arise in any of the cases in which the opinions were expressed, — not even in the case of Smith *v.* Adams; they were there, as they are here, rather matters of curious speculation than otherwise; though the subjects to which they relate must necessarily be noticed, in order to a proper classification of the general subject, and a more ready apprehension of the distinctions which it involves. But the questions remain undecided; and we leave them where we find them, — open to future consideration and adjudication, under the further lights which the future may develop.

4. We come now to the last branch of inquiry, named in our classification; to wit, as to the rights, if any, which a landowner has, — in the absence of anything arising from either express contract or positive legislation in respect to subsurface waters, which without any distinct, definite, and known channel, ooze, filter, or percolate in small veins from the lands of his neighbor into his own.

It is under this head that the questions made by the demurrer to the petition in this case clearly fall. For it is nowhere alleged in the petition that the waters, the abstraction and detention of which is complained of, reach the

lands of the plaintiff in any distinct, definite, or known channel, either above or below the surface; but on the contrary the petition describes them as a spring which 'issued and oozed' out of the land of the plaintiff, and from which spring a rivulet ran and meandered over and through the plaintiff's lands. Distinct and well-defined subterranean streams of water are comparatively rare; their existence, in any case, cannot properly be presumed; and the most liberal construction which can be given to the language of this petition will not justify us in considering it is as alleged that any such stream passes from the lands of the defendant to those of the plaintiff; and there is no claim that the natural rights of the parties, growing out of their relations of proximity to each other, have in any way been modified by either contract or legislation. The plaintiff is bound to state facts which — the statements being liberally construed — constitute a cause of action; and if everything which he avers in his petition may be true, and yet no cause of action exist, then the demurrer to the petition was rightfully sustained.

What was the object for which the 'hole' of which the plaintiff complains, was designed, we are not fully informed. It may have been a well for domestic use, or for watering stock; or a surface reservoir for watering stock, — not uncommon in some parts of this State; it may have been a cellar, stone quarry, mine, or coalpit; a salt well, or an oil well; or it may have been a fish-pond, or a miniature water view, for purposes of ornament, made in an effort in landscape gardening. For aught that appears in the petition, it may have been any of these, and embracing in its object also the malicious design to injure the plaintiff, as averred in the petition.

And it certainly is possible, that it may have been dug by the defendant from motives of unmixed malice, without any object, and, when done, incapable of answering any end, either of ornament, convenience, or profit, connected with the enjoyment and use of his property. And such

a case, should it ever arise, is reserved for future consideration.

The question then is, whether — in the absence of all rights derived either from contract or legislation — a landowner can have any legal claims in respect to subsurface waters which, without any distinct, and definite channel, ooze, filter, and percolate from adjoining lands into his own, when such waters are diverted, retained, or abstracted by the owner of such adjoining lands in the use of his property, for any object of either taste or profit, even though the use may be accompanied by a malicious intent to injure his neighbor by means of such use. Whatever points of casuistry may arise out of this question, cognizable in the court of individual conscience under the perfect law of Christian morals, we are of opinion that the law of the land can recognize no such claims; [and that, subject only to the possible exception of a case of unmixed malice,] the maxim 'cujus est solum ejus est usque at coelum, et ad infernos' applies to its full extent; and whatever damage may result from the exercise of this absolute right of property, to adjoining proprietors from the loss of such percolating subsurface waters, is damnum absque injuria With the exception of the nisi prius decision of Lord Ellenborough, in Balston *v.* Bensted, before referred to, and an obiter opinion of Parke, B., in Dickinson *v.* The Grand Junction Canal Co., supra, the current of decisions, to this effect, both in England and the United States, is uniform and consistent. I say, the opinion of Parke, B., in Dickinson *v.* The Grand Junction Canal Co., was obiter; for, on an inspection of that case it will be seen, that the plaintiff's rights, as there claimed by him, well rested on a basis of express contract; and there was no occasion to pass upon any principle of natural right growing out of the other relations of the parties.

The reasoning on which this current of decision proceeds is entirely satisfactory to us, and will be developed as we proceed with a brief review of the more prominent cases.

The first case arising in this country, and bearing directly

on the question before us, of which we are aware, is Greenleaf *v.* Francis, 18 Pick. 117. It was an action on the case. The plaintiff had dug a well in her cellar, two or three feet from the line between her land and that of the defendant, in which the water rose to the surface of the well. Within less than twenty years thereafter, the defendant, after ascertaining the exact situation of the plaintiff's well, dug a well for his own use, on his own land, about the same distance from the line, and as near to it as the party walls between the cellars would admit; in consequence of which — it would seem — the defendant obtained a good well; but the plaintiff's well became dry. On the trial of the case 'the plaintiff requested the judge to instruct the jury, that if they were satisfied that the defendant so placed his well, with the design and intent thereby to draw off the water from the plaintiff's well into his own, they should return a verdict for the plaintiff. But the judge instructed the jury, that the defendant had a legal right to dig a well upon any part of his own land for the purpose of obtaining water for his own use; that if he dug the well where he did, for this purpose, he was justified in so doing, although the effect might be to diminish the water in the plaintiff's well; that if he dug the well where he did, for the purpose of injuring the plaintiff, and not for the purpose of obtaining water for his own use, he was liable in this action; but that if he dug his well, for the purpose of accommodating himself with water, he was not liable for so doing, even if he, at the same time, entertained hostility toward the plaintiff and a desire to injure her, and these feelings were thereby gratified.' The jury, under these instructions, having returned a verdict for the defendant, and a motion for a new trial having been reserved for decision by the whole court, it was held that there was no error in the instructions given to the jury, and a judgment was rendered upon the verdict. And Putnam, J., in delivering the opinion of the court, among other things, says, — 'There is not evidence of any adverse use or possession at all. For the defendant had no means of

knowing that the plaintiff's well was supplied by springs in the defendant's soil, until the defendant dug for water there for his own use. . . . Indeed there is nothing in the case at bar, which limits or restrains the owners of these estates, severally, from having the absolute dominion of the soil, extending upward and below the surface so far as each pleases.' And, by way of support to the opinion expressed, that 'there is not evidence of any adverse use or possession at all,' he adds — 'he' (the defendant) 'sustained no injury by the use which the plaintiff made of the water which she found in her own well;' thus suggesting the idea — more fully noticed hereafter — that the doctrine of prescription, or presumption of grant from lapse of time, can have no proper application to a case where the party against whom it is sought to apply it, must, from the nature of the case be unconscious of, or at least uncertain in regard to, any injury or infringement of his rights. The next case, in the order of time, is Roath *v.* Driscoll, 20 Conn. 533. This was a bill in chancery, complaining of an injury to the plaintiff, by means of a diversion of water by the defendant, and asking for an injunction. And the question made and considered was — 'Can one of two adjoining proprietors, by first opening a watering place, prevent other persons from doing the same, on their own land; though by so doing, water is prevented from percolating the land so as to supply the first-made reservoir.' The question was answered in the negative. And Ellsworth, J., discussing the case, and delivering the opinion of the court, says — 'Nothing is gained by a mere continued preoccupancy of water under the surface. Why should any advantage be gained by preoccupancy? Each owner has an equal and complete right to the use of his land, and to the water which is in it. Water, combined with the earth, or passing through it, by percolation, or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not,

in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are so secret, changeable, and uncontrollable, we cannot subject them to the regulations of land, nor build upon them a system of rules, as has been done with streams upon the surface.'

Further, we may say, that by general consent of mankind, which is to be inferred from the nature of the right itself, each person must be left to enjoy any natural advantage belonging to his own land; and water, appearing and standing, either naturally or by artificial means, but never constituting a running stream, is such a natural advantage; were it otherwise, one man by sinking a well, though comparatively unimportant, might prevent the sinking of other wells, and the improvement of the neighborhood, by draining marshes, &c., and even the opening of mines of metal or coal; as the water might not percolate, with the same freeness, or abundance as before. Beside, no man is bound to know that his neighbor's well is supplied by water percolating his own soil; and he ought not, therefore, to be held to lose his rights, by such continual enjoyment. He cannot know that the first well requires any other than the natural and common use of water under the surface; nor can he know from whence the water comes; nor by what means it appears in one place or the other; nor which of the persons who first or afterward opens the earth, encroaches upon the right of the other. The law has not yet extended beyond open running streams. Nor can any light be obtained from the law of surface streams. Such streams are recognized as private property, and their use is regulated by principles of obvious equity and necessity. Their nature is defined; their progress over the surface seen and known, and uniform. They are not in the secret places of the earth, and a part of it; nor is there any secrecy in the influences which move them. As soon as they appear and pass over the

surface, they assume a distinct character, and are subject to the great law of gravitation. The purchaser of land knows what he purchases, and what control he can exercise over such a stream, and what are the rights of those above or below him.

Next comes the case of Chatfield *v.* Wilson, 28 Verm. 49. This is a well-considered and strongly-reasoned case both on principle and authority; and it is there held, that 'there are no correlative rights existing between the proprietors of adjoining lands, in reference to the use of the water in the earth or percolating under its surface. Such water is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is; and to it the law governing the use of running streams is inapplicable. And that 'An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induces it.' The case seems to go to the full extent of holding that the act of detaining or diverting subsurface percolating waters from an adjoining proprietor, gives him no right of action, though the act be one, under the circumstances, of unmixed malice.

The cases which I have thus far noticed are all cases in which the injury complained of related to wells or reservoirs artificially provided. But the next case — Ellis *v.* Duncan, 21 Barbour's S. C. R. 230 — relates to a spring and running stream. It is there held that 'the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor.' And that 'the rule that a man has a right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequentially injure his perceptible and clearly-defined rights, is applicable to the interruption of the subsurface supplies of a stream, by the owner of the

soil; and the damage resulting from such an interruption, is not the subject of legal redress.' And Strong, J., delivering the opinion of the court in the case, says — 'there can be no doubt of the correctness of the injunction, sic utere tuo ut alienum non laedas; but I have frequently had occasion to remark that it refers to such injuries only as the law will redress, and not to the large class which are denominated damnum absque injuria.'

The next case has been already incidentally referred to — that of Wheatley *v.* Baugh, 25 Penn. St. Rep. 528 — in which Chief Justice Lewis discusses the whole subject with a clearness and comprehensive ability certainly not exceeded by anything else which we have been able to find in the books. It is held in that case, that 'Where a spring depends for its supply upon percolations through the land of the owner above, and, in the use of the land for mining, or other lawful purposes, the spring is destroyed, such owner is not liable for the damages thus done, [unless the injury was occasioned by malice or negligence.] Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress.'

In discussing the principles involved in the case, the learned Chief Justice says: 'Percolations spread in every direction through the earth; and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly, the law has never gone so far as to recognize in one man a right to convert another's farm to his own use for the purpose of a filter. Such a claim, if sustained, would amount to a total abrogation of the right of property. No man could dig a cellar, or a well, or build a house on his own land, because these operations necessarily interrupt the filtrations through the earth. Nor could he cut down the forest and clear his land for the purpose of husbandry, because the evaporation which would be

caused by exposing the soil to the sun and air would inevitably diminish, to some extent, the supply of water which would otherwise filter through it. He could not even turn a furrow for agricultural purposes, because this would, partially, produce the same result. Even if this right were admitted to exist, the difficulty of ascertaining the fact of its violation, as well as the extent of it, would be insurmountable.'

Turning now to the English cases not already noticed, we come first to Acton *v.* Blundell, 12 M. & W. 324. This case was thoroughly argued and considered; and it was there held, that 'the owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first mentioned owner, and lays his well dry.' And the quaere is added, 'if the well had been ancient, whether there would have been any difference?'

The next, and, I believe, the only remaining case to be found in the English books, is Chasemore *v.* Richards, decided in the Exchequer Chamber, on error to the Court of Exchequer in 1857. 2 Hurlstone & Norman's Ex. R. 168. Except that there was no ingredient of malice found to exist in the acts of the defendant in that case, it was entirely analogous to the case before us, and involved the same questions. It was there held, that 'the owner of a mill on the banks of a river, cannot maintain an action against a landowner who' without malice, but having 'reasonable means of knowing the probable and natural effects' of his acts, 'sinks a deep well on his own land, and, by pumps and steam-engines, diverts the underground water which would otherwise have percolated the soil, and flowed into the river by which for more than sixty years, the mill was worked.' The case was strongly argued before seven judges of the Exchequer Chamber, and Coleridge, J., alone dissented. Unfortunately, a copy of the latest volume of House of

Lords' Cases has not yet reached our library; but from a copy of the Weekly Law Gazette, with which counsel have furnished us, we learn that this case was carried to the House of Lords on error, and there unanimously affirmed.[1] Lord Wensleydale (late Parke, B.), whose dictum in Dickinson *v.* The Grand Junction Canal Company, before noticed, was thereby overruled, concurring in the affirmance, though somewhat doubtingly and reluctantly. From this running abstract of the cases bearing immediately upon the question before us, it will be seen, that though the question is one of no little novelty, niceness, and difficulty, yet the current of decision is singularly uniform and consistent. It is evident that if the overwhelming current of authority is to be regarded, the judgment of the Court of Common Pleas must be affirmed. But, as I have already said, the reasoning on which this course of decision proceeds, is, to our minds, as satisfactory as the cases themselves are uniform and consistent.

The reasoning is briefly this: In the absence of express contract, and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to undergound waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy. 1. Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed, that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible. 2. Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage, and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.

That the doctrine of prescription, or presumption of grant

[1] 7 H. L. Cas. 349.

from lapse of time, can have no proper application to the question: 1. Because the party against whom the doctrine would have to be applied, could not be reasonably required to enter his caveat against the appropriation of a thing so hidden and obscure as is percolating underground water; and 2. Because the appropriation of such waters by an adjoining proprietor, is no infringement of his rights, so as to become the subject of legal redress, until such time as he himself has occasion to appropriate them.

And, as an act unlawful in itself, resulting in injury to another, whatever may have been the motive with which it was done, is none the less the subject of legal redress; so the act done, to wit, the using of one's own property, being lawful in itself, the motive with which it is done — whatever it may be as a matter of conscience — is, in law, a matter of indifference. It is hardly necessary to add, that this case does not include, and, in deciding it, we by no means intend to preclude, questions which may arise in a class of cases in which a landowner by positive acts poisons or corrupts the waters which percolate from his lands to those of his neighbor. Such cases are clearly distinguishable from this, and to them the considerations of public policy which govern this case do not necessarily apply. Wood *v.* Waud, 3 Exch. R. 748.

The judgment of the Court of Common Pleas, sustaining the demurrer to the petition, will be *Affirmed.*

To the same effect on the question of the motive of the defendant, see Bradford *v.* Pickles, 1895, 1 Ch. 145, in the Court of Appeal. At p. 166, A. L. Smith, L. J., says: 'In my judgment, by the common law of England a man may deal with his own in any way he pleases, irrespective of what his motive may be, so long as he trangresses no statute, no contract, or the maxim "sic utere tuo" etc.'

"If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be he would have no right to do it."
Lord Halsbury L.C.
95 A.C. @ p. 394.

SWETT *v.* CUTTS.

Supreme Court of New Hampshire, December, 1870. 50 N. H. 439.

The owner of surface water not gathered into a stream may, in the reasonable use of his land and only in such use, divert it from his neighbor. No title by prescription can arise in such a case, in favor of the neighbor.

Action for damages for causing surface water collected and running in a ditch adjoining a highway to be thrown back upon the plaintiff's land. The declaration in the first count alleged: 'There is, and from time immemorial has been . . . contiguous to the land of the said defendant . . . and of the said plaintiff a certain ditch or water-course, in which in seasons of rain and melting snow the water has been wont to gather and accumulate,' which water, by means of a depression in the defendant's land, 'has [flowed] from time immemorial, until the wrongful acts of the said defendant hereinafter mentioned, and but for said wrongful acts would still . . . flow . . . over and across the said land of the said defendant. Yet the said defendant, intending to wrong and injure the said plaintiff . . . did . . . build, erect, and place a high embankment or barrier across said depression . . . by reason whereof' the accumulating water has been turned with great force over and upon the plaintiff's land, and thereby the plaintiff's land 'has become greatly washed and carried away and said' land of the plaintiff 'has thereby been rendered of no value.'

There was evidence supporting the declaration, and also that the plaintiff had enjoyed the flow of the water for twenty years and more without interruption, until the acts complained of.

Certain instructions to the jury were asked for by the defendant and refused, which were based on the view that

the defendant had an absolute and unqualified right to do as he pleased with the water. Instructions were given on the other hand to the effect that the jury might find, on the evidence before them, that the plaintiff had acquired by prescription a right to the flow of the water in question, and if he had that he was entitled to recover; to this the defendant excepted.

Verdict for the plaintiff; motion for a new trial, also in arrest of judgment on the alleged insufficiency of the declaration.

Bellows, C. J., for the court. — In respect to water not gathered into a stream, but circulating through the pores of the earth, beneath its surface, it is now settled that a landowner who, in the reasonable use of his own land, obstructs or diverts the flow of such water, even to the injury of his neighbor's land, is not liable to respond in damages. This is not upon the principle that has been in some cases adopted, that the landowner has the absolute and unqualified property in all such water as may be found in his soil, and may therefore do what he pleases with it, as with the sand and rock that form part of that soil, but upon the same general principle that governs the use of water flowing on the surface in well-defined streams or channels; that is, to make a reasonable use of it for domestic, agricultural, and manufacturing purposes, not trenching, however, upon the similar rights of others. So in respect to water percolating through the soil, the landowner may ordinarily drain his land, may obstruct the usual course of the flow of such water by walls for cellars and other purposes, and may dig wells and use the water for domestic and agricultural purposes. The test is, the reasonableness of the use or disposition of such water; and ordinarily that is a question of fact for the jury under the instructions of the court.

In favor of the unqualified and absolute right of the landowner to dispose of all such water as he finds in his soil, or that he may draw there by wells dug in his own land, it is

urged that he cannot know the condition of the water beneath the surface, the changes that take place, or the sources of supply of the springs and wells in the adjoining lands, or what portion is drawn from his own soil and what was originally found in his neighbor's, and therefore that there is no ground for presuming a mutual agreement between the landowners in ages past in respect to such underground water or for holding a right to have been acquired by use or acquiescence. So is the leading case of Acton *v.* Blundell, 12 M. & W. 336.

In the first place we do not understand that the right of the riparian owner to the use of streams of water running upon the surface is to be deduced from the presumed mutual agreement or acquiescence of landowners, but rather as a natural right, incident to the land, to partake in the enjoyment of the common bounty of Providence, as in the cases of light and air. Dickinson *v.* Grand Junction Canal Co., 7 Ex. 299; Shury *v.* Piggot, 3 Bulstr. 339; Chasemore *v.* Richards, 2 H. & N. 168;[1] Tyler *v.* Wilkinson, 4 Mason, 397. And in the second place although it may be true that in the majority of cases the condition of the waterflow beneath the surface is not accurately known, yet in a great many instances its general course, from the slope of the surface, the appearance of springs and other indications of water, is quite obvious. Indeed this doctrine appears to embrace that large class of cases where the water flows in sight upon the surface in wet seasons of the year, but not to such an extent as to mark a regular channel with banks and sides, and also where the water moves slowly, but obviously, through boggy or swampy lands constituting the sources of streams and rivers. The doctrine in fact would justify a landowner in intercepting and diverting the water so working its way through spongy or swampy land at any point, before it was gathered into a regular channel, although it might be obvious that such water was the source of a stream which furnished valuable mill-sites, even although such

[1] 7 H. L. Cas. 349.

diversion was in no way necessary to the enjoyment of his land.

The contrary doctrine in respect to water percolating beneath the surface is established in this State in the well-considered case of Bassett *v.* Salisbury Manufacturing Co., 43 N. H. 569; and the question is, whether the doctrine of that case applies to water which appears on the surface in the season of melting snow and heavy rains, but is not gathered into any regular channel or watercourse, or whether such water stands upon the footing of permanent streams running upon the surface in regular channels. If upon the latter footing, then the instructions were sufficiently favorable to the defendant.

Upon the examination of the cases which maintain the doctrine that the landowner may dispose of the water percolating beneath his soil as he pleases, they will be found to include the case of mere surface water not gathered into streams. In Rawstron *v.* Taylor, 11 Ex. 380, it is laid down by Parke, B., in the opinion of the court, that in the case of common surface water rising out of springy or boggy ground and flowing in no definite channel, although contributing to the supply of the plaintiff's mill, the supply being merely casual and the water having no defined course, the defendant is entitled to get rid of it as he pleases. The same doctrine is announced in Broadbent *v.* Ramsbotham, 11 Ex. 602, which was an action for diverting water on defendant's land which naturally flowed over the surface of a hill into a brook which supplied plaintiff's mill. The court, per Anderson, B., says the right of the plaintiff cannot extend further than the right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, he says, all the water falling from heaven and shed upon the surface of the hill at the foot of which the brook runs must, by the natural force of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on

which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel.

It is quite clear that such surface water is put upon the same footing as water percolating beneath the surface; and the cases are quite numerous that show it, and we think it should be so upon principle. The great objection to applying the doctrine which forbids the diversion of running streams to water circulating in the pores of the earth is that, if applied without qualification, it would to a great extent prevent the beneficial enjoyment and improvement of one's own land. A similar effect, though less extensive, would be produced by applying that doctrine to mere surface water not gathered into any regular and defined channel. In many cases of springy and swampy lands the water moves from a higher to a lower level over a wide space, which under such a doctrine could not be drained or reclaimed. So in case of rain falling upon the side of a hill, and which would naturally find its way upon the surface into a brook at the bottom — such a doctrine might effectually prevent the improvement of very extensive tracts of land.

Again: the boundary line between what shall be deemed underground percolation and mere surface water would often be extremely difficult to define, and from that source serious embarrassments might arise. From the nature of the case, then, we think that the line is properly drawn between water running in natural streams, with well-defined channels, and that which is merely spread over the surface and flows without any regular course or channel or circulates under the surface through the pores of the earth. The authorities are numerous to this point, besides those already cited. Among them are 3 Kent's Com. 439, note 2, and cases; Ashley *v.* Wolcott, 11 Cush. 192; Luther *v.* Winnisimmet Co., 9 Cush. 171; Wheatley *v.* Baugh, 25 Penn. St. 528; Buffam

v. Harris, 5 R. I. 243. See also Ellis *v.* Duncan, 21 Barb. 230; Washburn, Easements, 358, and cases cited.

These authorities, to be sure, hold generally that, in respect to mere surface and underground water not gathered into streams, the landowner where it is found has the unqualified right to dispose of it as he pleases, although in some cases the right appears to be limited to cases where it is dealt with in the improvement of such owner's land, and without malice; as in Wheatley *v.* Baugh, 25 Penn. St. 532. But these cases concur in putting all water not gathered into watercourses, whether upon the surface or underneath, on the same footing; and so far we think they are right. As however the case of Bassett *v.* Salisbury Manufacturing Co. holds, in respect to water percolating through the soil, that the landowner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land, we think the same rule must be applied to mere surface water not gathered into a stream.

To give the landowner the absolute and unqualified right of disposition of such water would in many instances be productive of great mischief to his neighbors and lead to interminable struggles between them; for the same power to deal with such water would exist in each landowner when it was on his land. In many instances the water would assume so much of the character of a natural watercourse as to make the application of such a doctrine odious and unjust, while at the same time a total want of power to modify such flow to meet the necessities of the landowner would often stand in the way of valuable improvements which might be made without serious detriment to any one.

The doctrine which we maintain adapts itself to the ever varying circumstances of each particular case, from that which makes a near approach to a natural watercourse down by imperceptible gradations to the case of mere percolation, giving to each landowner, while in the reasonable use and improvement of his land, the right to make reasonable modifications of the flow of such water in and upon his land. In

determining this question all the circumstances of the case would of course be considered; and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other landowners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen.

Ordinarily a landowner may dig a well upon his own land, even though by percolation it draws the water from his neighbor's land, or even his well; but it would present a very different question if the well was dug by him with the express purpose of transferring the water in his neighbor's spring or well to his own and knowing that this would be the result. So too the owner of extensive swamp lands, which are the source of a river furnishing valuable mill sites, might reasonably be allowed to drain it by bringing the water into one channel, when it might be regarded as unreasonable to divert it entirely from its natural course. So also excavations maliciously made in one's own land, with a view to destroy a spring or well in his neighbor's land, could not be regarded as reasonable; and there would be much ground for holding that if the spring or well in his neighbor's land could be preserved without material detriment to the landowner making such excavations, it would be evidence of malice or such negligence as to be equivalent to malice. Wheatley *v.* Baugh, 25 Penn. St. 532.

In the case before us the instructions asked for by the defendant assumed that he had an absolute and unqualified right to dispose of this water as he pleased, while the instructions given assumed that if the state of things proved had existed from time beyond memory the defendant had no right at all to stop the flow of this water over his land and thus cause it to flow over the plaintiff's land. If this was mere surface water not gathered into a watercourse, as we should infer it was from the case, the instructions [1] upon

[1] That is, that the plaintiff could recover if he had enjoyed the flow for twenty years without interruption.

the principles we have stated are erroneous, unless the plaintiff had acquired a right by prescription to have the water flow over the defendant's land. On that point, to constitute a title by prescription there must have been an adverse user under a claim of right for twenty years or more; but here there has been no such user; the defendant has merely permitted the surface water casually on his land to flow off over it. It does not appear that the plaintiff has claimed or exercised a right to discharge the water on his land upon the defendant's land, or that he has ever done any act or put himself in a situation by reason of which the defendant could maintain a suit against him and thus interrupt a process of gaining title by prescription. It is true that some water which had gathered on the plaintiff's land may have passed off in the same way over the defendant's land, but if it did it was by no act of the plaintiff nor under any claim of right by him. So the fact that this water had passed over defendant's land for more than twenty years does not change its character and make it a watercourse.

In Wood *v.* Waud, 3 Ex. 778, the court holds that the right to watercourses arising from enjoyment is not the same in respect to natural and artificial watercourses; holding that as to the latter the right must depend upon their character, whether of a permanent or temporary nature, and upon the circumstances under which they are created; and by way of illustration say that the flow of water from a drain, for the purpose of agricultural improvements, for twenty years could not give a right to a neighbor so as to preclude the proprietor from altering the level of his drains for the greater improvement of his land.

This precise case arose in Greatrex *v.* Heywood, 8 Ex. 291, and was settled in accordance with this doctrine of Wood *v.* Waud. The same doctrine was applied in the case of drains for mining purposes, in Arkwright *v.* Gell, 5 M. & W. 203. In these cases, from the temporary nature of such drains and artificial watercourses, is deduced the inference that the use of the water discharged by them

could not have been enjoyed as matter of right. See Wood *v.* Waud, 3 Ex. 778. In the subsequent case of Rawstron *v.* Taylor, 11 Ex. 369, surface water on defendant's land for more than twenty years had flowed over land of the plaintiff into his watercourse, and he had used it; but it was held that plaintiff could maintain no action against defendant for diverting it on his own land.

In respect to water percolating beneath the surface the tendency of the authorities is against acquiring a right by prescription. The use of such water upon one's own land is apparently rightful, and is no such invasion of the rights of the adjoining owner as would enable him to maintain a suit, for it would be impossible to know that he was drawing water from his neighbor's land. Wash. Easements, 384–390, and cases cited. In this respect water that comes to the surface stands on a different footing, and yet in general they are governed by the same rules. There may doubtless be cases where rights may be acquired by user in respect to such surface water, as in the case of eaves-drip; but it can be only when the use is adverse and such as to give notice to the party against whom the right is acquired. In the case before us, however, no right of the defendant was invaded by any act of the plaintiff. He (the defendant) simply permitted the water gathered by the roadside to flow over his land, and so long as he did so he could maintain no action against any one; and we think the plaintiff had gained no right by prescription to have this water flow over the defendant's land, and there must be *A new trial.*

NUISANCE.

HAUCK *v.* TIDEWATER PIPE LINE CO.

Supreme Court of Pennsylvania, February, 1893. 153 Penn.St. 366.

In an action for injury done to land by reason of poisons coming from the defendant's premises not incident to the development of the resources of the defendant's land, it is no defence that the defendant's business at the time was lawful and conducted without negligence.

Appeal by the defendants from a verdict and judgment against them in an action for damages resulting from nuisance to property. The defendants were a limited partnership company, in the business of laying pipes and carrying oil through the same in the oil region of Pennsylvania. The business relating to the present suit was conducted entirely upon the defendants' premises, — but the oil was brought from elsewhere; and the plaintiffs complained that oil had escaped from the defendants' pipes and percolated into the plaintiffs' land and poisoned the plaintiffs' springs and a mill pond, destroying fish in the latter and making a dwelling-house on the plaintiffs' land unfit for use as such. The defendants had no power to take property by eminent domain.

The defendants contended that they were liable, not for nuisance, but only on proof of negligence. The case turned upon certain alleged errors of the lower court, which are set out in the opinion below.

Paxson, C. J., for the court. — . . . The fifth specification alleges that the court below erred in declining to affirm the defendants' fourth point. The point was as follows:

'That the defendant is not liable for damages resulting from its business by reason of oil escaping from its own lands where it is being handled, except such oil escapes through negligence of the company or its agents.'

This point presents the main feature of the case. The court below refused it, upon the ground that it was a question of nuisance and not of negligence, citing Pottstown Gas Company *v.* Murphy, 39 Pa. 257, in support of this view. In that case it was held that the gas company was answerable for consequential damages, such as the corruption of the plaintiff's ground and well, by the fluids percolating from the works; and that a corporation is exempt from consequential damages only where, being clothed with the State's right of eminent domain, it takes private property for public use upon making proper compensation, and where such damages are not part of the compensation required.

We think the learned judge was right under the authority above cited, in holding that this was not a case of negligence, but of nuisance or of consequential damages. For this reason we think that the case of The Railroad Company *v.* Lippincott, 116 Pa. 472, and of Railroad Company *v.* Marchant, 119 Pa. 559, have no application. The railroad companies in those cases were clothed with the right of eminent domain, and were expressly authorized by law to construct their roads and operate them. It was held therefore that any injury resulting from such operation, without negligence and without malice, was damnum absque injuria. In the case in hand the company was clothed with no such powers.

We think the case closely resembles that of Robb *v.* Carnegie, 145 Pa. 324, in which it was held that the owners of coke ovens, the gases from which injured the growing crops upon the adjoining farm, were liable in damages to the owner of said farm for such injury. An attempt was made in that case, as it has been made in this, to bring it within the doctrine of Pennsylvania Coal Company *v.* Sanderson, 113

Pa. 126. In the latter case the injuries complained of were the natural and necessary result of the development by the owner of the resources of his own land. In opening a drift for the purpose of mining coal, the mine water, impregnated with the impurities which it had taken up from the earth, coal and other minerals in the mines, either flowed from the mouth of the drift, or was pumped from the mines, and allowed to take its natural course on its way to the ocean. It will thus be seen that the flow of mine water was the natural and necessary result of the development by the owner of his own property. This was not the case in Robb *v.* Carnegie, nor is it the case here. In Robb *v.* Carnegie the refuse coal which was used for making coke was not mined upon the premises of the company, but was brought from other mines at a distance. In the case in hand the oil which was the cause of the injury to the plaintiffs' property was brought from a distance, allowed to escape from the pipes and to percolate through plaintiff's land and destroy his springs. It was not in any sense a natural and necessary development of the land owned by the company.

The appellants attempted to distinguish this case from Robb *v.* Carnegie by the fact that in the latter case the smoke and gases from the works were carried by the wind and lodged upon the plaintiffs' land; while in the latter [sic, for present] case the escaping oil merely percolated through the soil until it reached plaintiff's springs. The essential difference between being carried through the air and percolating through the soil has not been made to appear. We regard it as a distinction without a difference.

As was correctly said by the learned judge in a portion of his charge embraced in the tenth specification: 'If the mere fact that the business is a lawful business, and has been conducted with care, would be a defence where a neighbor's land had been injured in consequence of the business carried on there, the escape of gas, for instance, or the escape of oil, the result would be that a man might lose his farm, — might be compelled to leave it, and have no compen-

sation, simply because the business which brought about this loss was a lawful business and was carried on carefully. That is not the law. No man's property can be taken, directly or indirectly, without compensation, under the law of this State. Hence there are cases, and a great many of them, where a defendant is held liable in damages, although his business is lawful and he has exercised care in carrying it on.'

In the consideration of this class of cases care must be taken to distinguish between the natural and necessary development of the land itself and injuries resulting from the character of some business not incident and necessary to the development of the land or the minerals or other substances lying within it. The owner of the land has the right to develop it by digging for coal, iron, gas, oil, or other minerals, and if in the progress of this development an injury occurs to the owner of adjoining land, without fault or negligence on his part, an action for such injury cannot be maintained. If this were not so, a man might be utterly deprived of the use of his property. It is not so where the injury is caused by the prosecution of a business which has no necessary relation to the land itself, and is not essential to its development. *Judgment affirmed.*

ST. HELEN'S SMELTING CO. *v.* TIPPING.

House of Lords, 1865. 11 H. L. Cas. 642.

Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages in respect of injury created by it to property in the neighborhood.

This was an action brought by the plaintiff to recover damages for injuries done to his trees and crops by the defendants' works. The defendants are the directors and

shareholders of the St. Helen's Copper-Smelting Company (limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor-house and about 1,300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that 'the defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapors, and other noxious matter to issue from the said works and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage were greatly injured; the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed; and also the reversionary lands and premises were depreciated in value.' The defendants pleaded not guilty.

The cause was tried before Mr. Justice Mellor, at Liverpool, in August, 1863, when the plaintiff was examined, and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapors, which, when the wind was in a particular direction, affected persons as well as plants in his grounds. On cross-examination, he said he had seen the defendant's chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the part of the defendants, evidence was introduced to show that the whole neighborhood was studded with manufactories and tall chimneys; that there were some alkali works close by the defendant's works; that the smoke from one was quite as injurious as the smoke from the other; that the smoke of both sometimes united; and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendant's works existed before the plaintiff bought the property was also relied on.

The learned judge told the jury that an actionable injury was one producing sensible discomfort; that every man,

unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and, therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it; that when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in countries where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

The defendant's counsel submitted that the three questions which ought to be left to the jury were, 'whether it was a necessary trade; whether the place was a suitable place for such a trade; and whether it was carried on in a reasonable manner.' The learned judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative; whether the business there carried on was an ordinary business for smelting copper, and the answer was, 'We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible.' But to the question whether the jurors thought that it was carried on in a proper place, the answer was, 'We do not.' The verdict was therefore entered for the plaintiff, and the damages were assessed at £361 18*s.* 4½*d.* A motion was made for a new trial on the ground of misdirection, but the rule was refused. 4 Best & S. 608. Leave was, however, given to appeal, and the case was carried to the Exchequer Chamber, where the judgment was affirmed. 4 Best & S. 616.

The judges were summoned, and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee attended.

After the argument, the Lord Chancellor (Lord Westbury) proposed these questions to the judges: 'Whether directions given by the learned judge at nisi prius to the jury were correct? or, Whether a new trial ought to be granted in this case?'

Upon a short consultation among the judges, Mr. Baron Martin answered that the directions were correct, being such as had been given in cases of this kind for the last twenty years.

THE LORD CHANCELLOR. — My lords, I think your Lordships will be satisfied with the answer we have received from the learned judges to the questions put by this House.

My lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is

carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of present appellants, in their works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your lordships are asked to set aside that verdict and to direct a new trial is this, that the whole neighborhood where these copper-smelting works were carried on is a neighborhood more or less devoted to manufacturing purposes of a similar kind, and, therefore, it is said that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My lords, I apprehend that that is

not the meaning of the word 'suitable,' or the meaning of the word 'convenient,' which has been used as applicable to the subject. The word 'suitable' unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them (and they are sufficiently unfolded by the judgment of the learned judges in the court below), I advise your lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal, with costs.

Lord Cranworth. — My lords, I entirely concur in opinion with my noble and learned friend on the woolsack, and also in the opinion expressed by the learned judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years; I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice Mellor. He says, 'It must be plain that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place.' I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury; because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honor of being one of the barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, 'You must look at it, not with a view to the question whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields;' because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact, was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractly or with reference to the facts, better than he has done in this case.

Lord Wensleydale. — My lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included. The defendants say, 'If you do not mind, you will stop the progress of works of this description.' I agree that it is so; because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights, and allow a person to say, 'I will bring an action against you for this and that, and so on.' Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected.'

My lords, I do not think the question could have been

more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Judgment of the Exchequer Chamber affirming the judgment of the Court of Queen's Bench affirmed, and appeal dismissed, with costs.

DAMAGE BY ANIMALS.

MAY *v.* BURDETT.

Queen's Bench of England, Trinity Term, 1846. 9 Q. B. 101.

A person who keeps an animal accustomed to attack and bite people, with knowledge that it is so accustomed, is prima facie liable to any person attacked and injured by such animal, without negligence or default in the securing or taking care of it.

Case. The declaration stated that defendant, 'before and at the time of the damage and injury hereinafter mentioned to the said Sophia, the wife of the said Stephen May, wrongfully and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined: which said monkey, whilst the defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the 2d of September, 1844, did attack, bite, wound, lacerate, and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame, and disordered, and so remained and continued for a long time, to wit, from the day and year last aforesaid, to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey, so attacking, biting, wounding, lacerating, and injuring her as aforesaid, the said Sophia has been greatly injured in her health,' &c.

Plea, not guilty. Issue thereon.

On the trial, before Wightman, J., at the sittings in Middlesex, after Hilary Term, 1845, a verdict was found for the plaintiff with £50 damages. Cockburn, in the ensuing term, obtained a rule to show cause why judgment should not be arrested. *Cur. adv. vult.*

Lord Denman, C. J., for the court. — This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, &c.

It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be, that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities.

The precedents, both ancient and modern, with scarcely

an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register and ending with Thomas *v.* Morgan, 2 Cro. M. & R. 496, s. c. 5 Tyr. 1085, and all in the same form, or nearly so. In the Register, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of Mason *v.* Keeling, 12 Mod. 332, s. c. 1 Ld. Raym. 606, much relied upon on the part of the defendant, want of due care was alleged, but the scienter was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various dicta in the books were cited to show that this is an action founded on negligence, and therefore not maintainable unless some negligence or want of care is alleged.

In Comyns's Digest, tit. Action upon the Case for Negligence (A 5), it is said that 'an action upon the case lies for a neglect in not taking care of his cattle, dog,' &c.; and passages were cited from the older authorities, and also from some cases at nisi prius, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be drawn from

an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed without express averment. The precedents, as well as the authorities, fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of Smith *v.* Pelah, 2 Stra. 1264, and a passage in 1 Hale's Pleas of the Crown, 430,[1] put the liability on the true ground. It may be that, if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a prima facie liability in the defendant.

It was said indeed, further, on the part of the defendant, that, the monkey being an animal feræ naturæ, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to

[1] After stating that 'if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner knew not his quality, he is not punishable,' &c., Hale adds (citing authorities) that 'these things seem to be agreeable to law:

'1. If the owner have notice of the quality of his beast and it doth anybody hurt, he is chargeable with an action for it.'

'2. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yes, an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I know it adjudged in Andrew Baker's Case, whose child was bit by a monkey that broke his chain and got loose.

'3. And therefore in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damage.' 1 Hale's P. C. 430, part 1, c. 33. — *Reporter.*

this objection; for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred while the defendant kept it. We are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule therefore will be discharged.

Rule discharged.

ELLIS *v.* LOFTUS IRON CO.

Common Pleas of England, November, 1874. L. R. 10 C. P. 10.

A. commits a trespass if his horse puts part of his body over the land of B., unjustifiably.

Appeal from the County Court of Glamorganshire. The case as stated on appeal was as follows: The action was brought to recover £50 for injuries to the plaintiff's mare caused by the defendants' negligence. The plaintiff was the occupier of a farm in the parish of Llansarran, and by arrangements between the plaintiff's landlord, the plaintiff, and the defendants, a portion of a field of the plaintiff's farm was let to the defendants for the execution of certain works, and a plot was fenced in by the defendants by means of a wire fencing. The plaintiff's land, which adjoined the part taken by defendants, was used by him as grazing land for horses and cattle, to the knowledge of the defendants.

The defendants were possessed of a stallion used by them as a draft cart-horse; and on Sunday the 18th of August, this horse was turned into the plot occupied by the defendants. The plaintiff had full knowledge of the condition of the fence surrounding it. The mare grazed in the remaining portion of the field adjoining that portion occupied by the defendants. The defendants' horse had been turned out on former occasions on the same plot and had always been watched. The horse of the defendants and one of the plain-

tiff's mares got close together on either side of the wire fence, and the horse by biting and kicking the mare through the fence committed the injury complained of, the damage being taken at £15.

It was proved that the defendants' horse did not trespass on the land of the plaintiff by crossing the fence. Both animals were close to the fence when the injury happened. There was no evidence that the horse was of a vicious temper or had bitten or kicked any animal before; on the contrary it was stated that the horse was as quiet in temper as you would ever wish a horse. The plaintiff had warned the defendants to keep the horse away from his mares.

The judge being of opinion that there was no trespass, and that the damage was too remote, held that there was no case for the jury. The question for this court was, whether the plaintiff was entitled to recover from the defendants for the injuries caused as aforesaid.

Lord Coleridge, C. J. — The judgment of the County Court judge must, I think, be reversed, on the ground that there was evidence of a trespass, and the damages were not too remote. I cannot say I entertain any doubt in the matter. It is clear that in determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has moreover been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law.

The only remaining question is, whether the damages were too remote. I cannot see that they were; they were the natural and direct consequence of the trespass committed. These considerations would dispose of the case, but apart from any technicalities of law it seems to me that the merits are in the plaintiff's favor. It appears that a piece of land was railed off for the defendants' convenience, and the plaintiff being in the habit of keeping mares on the adjoining land previous to the accident the defendants' stallion had always been watched. Therefore without saying that there was any gross negligence or carelessness on defendants' part, I think there was some default on their part, without which the accident would not have happened. It is not necessary for me to discuss the authorities that have been cited at length. I will only say that Lee *v.* Riley, 18 C. B. N. S. 722; 34 L. J. C. P. 212, is a very strong authority for our present decision. For these reasons I am of opinion that our judgment should be for the plaintiff.

KEATING, J. — I am of the same opinion. The County Court judge appears to have held that the facts as stated did not amount to evidence of an actionable wrong on the part of the defendants. There seems to me, however, to be abundant evidence that the defendants' horse committed a trespass for which the defendants are liable.

The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet protruded through the fence over the plaintiff's land, and that would in my opinion amount in law to a trespass. If evidence of negligence was necessary to constitute a trespass in this case, in my opinion there is abundant evidence of negligence on the defendants' part, and none on that of the plaintiff. The defendants erected the fence and turned the horse into the field for their own convenience; they had ample warning with respect to the danger, and in consequence of such warning they had the

horse watched on previous occasions, but failed to do so on the occasion when the damage was caused.

Brett, J. — I must confess I did entertain some doubt on this matter. The questions are whether there was any evidence of a trespass on the plaintiff's land for which the defendants would be liable, and if there was then whether the damage is too remote. I had no doubt that if there was evidence of negligence, and as a result of such negligence an animal of the defendants passed wholly or in part on to the plaintiff's land such a circumstance would constitute a trespass; but what I did doubt for some time was whether, where there was no negligence at all on the part of the defendants, the same consequence would follow.

Having looked into the authorities, it appears to me that the result of them is that, in the case of animals trespassing on land, the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass. Blackstone, 16th ed. vol. iii. c. 12, p. 211; Chitty, Pleading, 7th ed. vol. i. p. 98; and Comyns' Digest, title Trespass, C, are all authorities to this effect. If, however, it were necessary that there should be evidence of negligence, I cannot say that I should go the length that my brother Keating did, in saying that there was abundant evidence of negligence, though I think there was some evidence. That would be sufficient to support our judgment in any view of the law; but I put my judgment on the ground that by law there was a trespass in this case without evidence of negligence. That being so, the question remains whether the damages were too remote. The case of Lee *v.* Riley is a distinct authority to the contrary; and the American case of Vandenburgh *v.* Truax, 4 Denio, 464, quoted in the notes to Vicars *v.* Wilcocks, 2 Smith's L. C. p. 499, 6th ed., is to the same effect.

Denman, J. — I rather agree with my brother Brett as to the amount of evidence of negligence in this case. I am by no means clear that there was such evidence of negligence as, if it was necessary to prove negligence, would have properly entitled the plaintiff to a verdict. The County Court judge appears to have nonsuited the plaintiff on the ground that there was no trespass, and the damages were too remote. Now during the early part of the argument I thought it a very strong thing to say that whenever any part of an animal passed over or through a fence, inasmuch as the same act, if done by a man, might technically be a trespass, therefore there was a trespass on the part of the owner of the animal. But after hearing the authorities cited, and especially the case of Lee *v.* Riley, and the passages from Comyns' Digest and Chitty on Pleading, it appears to me that they undoubtedly bear out that view.

It seems hard, when two parties have adjoining lands with a fence between them, and a quarrel arises between the animals on either side of the fence, one party should be liable for the consequences, though not in reality guilty of default or neglect any more than the other, by reason of the application to the mere act of an animal of the technical rule 'cujus est solum ejus est usque ad cælum.' I must say, however, that I cannot see, upon the authorities, any escape from the conclusion that it must be so.

The only remaining point is whether the damages were too remote. As to that I agree with the rest of the court that the case of Lee *v.* Riley is conclusive.

Judgment for the plaintiff.

Compare Millen *v.* Faudrye, Poph. 161; Glenham *v.* Hanby, 1 Ld. Raym. 739; Mason *v.* Keeling, id. 608, dictum attributed to Lord Holt; and note to the original report of the principal case.

ESCAPE OF DANGEROUS THINGS.

RYLANDS *v.* FLETCHER.

House of Lords, July, 1868. L. R. 3 H. L. 330.

He who brings on his land and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; want of negligence is no excuse for its escape.

This was a proceeding in error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, Fletcher brought an action against Rylands & Horrocks to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the defendants had constructed. The declaration contained three counts, each count alleging negligence on the part of the defendants, but in this House the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the defendants in the exercise of them.

The cause came on for trial at the Liverpool Summer Assizes of 1862, when it was referred to an arbitrator, who was afterwards directed, instead of making an award, to prepare a special case for the consideration of the judges. This was done, and the case was argued in the Court of Exchequer in Trinity Term, 1865.

The material facts of the case were these: The plaintiff was the lessee of certain coal mines known as the Red House Colliery, under the Earl of Wilton. He had also obtained from two other persons, Mr. Hulton and Mr. Whitehead,

leave to work for coal under their lands. The positions of the various properties were these: There was a turnpike road leading from Bury to Bolton, which formed a southern boundary to the properties of these different persons. A parish road, called the Old Wood Lane, formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. Whitehead on the east and Lord Wilton on the west. The defendants' grounds lay along the turnpike road, or southern boundary, stretching from its centre westward. On these grounds were a mill and a small old reservoir. The proper grounds of the Red House Colliery also lay in part along the southern boundary, stretching from its centre eastward. Immediately north of the defendants' land lay the land of Mr. Hulton, and still further north that of Lord Wilton. On this land of Lord Wilton the defendants in 1860 constructed (with his lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord Wilton and the land of Mr. Hulton, and so reach the defendants' mill. The line of direction from this new reservoir to the Red House Colliery mine was nearly southeast.

The plaintiff, under his lease from Lord Wilton, and under his agreements with Messrs. Hulton and Whitehead, worked the mines under their respective lands. In the course of doing so he came upon old shafts and passages of mines formerly worked but of which the workings had long ceased. The origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal; and the former especially seemed filled with marl and rubbish. Defendants employed for the purpose of constructing their new reservoir persons who were admitted to be competent as engineers and contractors to perform the work, and there was no charge of negligence made against the defendants personally. But in the course of excavating the bed of the new reservoir five old shafts,

running vertically downwards, were met with in the portion of the land selected for its site. The case found that 'on the part of the defendants there was no personal negligence or default whatever, in or about, or in relation to, the selection of the said site, or in or about the planning or construction of the said reservoir; but in point of fact reasonable and proper care and skill were not exercised by or on the part of the persons so employed by them with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear.'

The reservoir was completed at the beginning of December, 1860, and on the morning of the 11th of that month, being then partially filled with water, one of the aforesaid vertical shafts gave way, and burst downwards, in consequence of which the water of the reservoir flowed into the old passages and coal-workings underneath, and by means of the underground communications then existing between them and the plaintiff's workings in the Red House Colliery the colliery was flooded and the workings thereof stopped.

The question for the opinion of the court was whether the plaintiff was entitled to recover damages by reason of the matters hereinbefore stated. The Court of Exchequer, Mr. Baron Bramwell dissenting, gave judgment for the defendants. 3 H. & C. 774. That judgment was afterwards reversed in the Court of Exchequer Chamber, 4 H. & C. 263; L. R. 1 Ex. 265. The case was then brought on error to this House.

The Lord Chancellor (Lord Cairns).—My lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land which,

for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants, on which they proposed to construct their reservoir, there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish; and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally the defendants appear to have taken no part in the works or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned.[1] However, my lords, when the reservoir was constructed, and filled or partly filled with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff and flooded his mine, causing considerable damage, for which this action was brought.

[1] As to the relation of the contractor and the engineer to the plaintiff see Hilliard *v.* Richardson, 3 Gray, 349.

The Court of Exchequer, when the special case stating the facts to which I have referred was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinon, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if in what I may term the natural user of that land there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature. As an illustration of that principle I may refer to a case which was cited in the argument before your lordships, the case of Smith *v.* Kenrick, 7 C. B. 515, in the Court of Common Pleas.

On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, — and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of

the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil to which I have referred, the evil namely of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequences of that, in my opinion, the defendants would be liable. As the case of Smith *v.* Kenrick is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, the case of Baird *v.* Williamson, 15 C. B. N. S. 317, which was also cited in in the argument at the bar.

My lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: 'We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor

who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.'

My lords, in that opinion I must say I entirely concur. Therefore I have to move your lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

Lord Cranworth. — My lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of Lambert *v.* Bessey, reported by Sir Thomas Raymond.[1] And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes however innocently damage to another, it is obviously only just

[1] T. Raym. 421. But on the generality of this language compare Brown *v.* Kendall, ante, p. 191.

that he should be the party to suffer. He is bound 'sic uti suo ut non laedat alienum.' This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of Smith *v.* Kenrick and Baird *v.* Williamson. In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water that it should not impede him in his workings. The water, in that case, was only left by the defendant to flow in its natural course.

But in the later case of Baird *v.* Williamson the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable

for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead, and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for according to the principle acted on in Smith *v.* Kenrick, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff; and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur therefore with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.

See Torts (Students' Series) c. xvi.; L. C. Torts, 492–505.

LOSEE *v.* BUCHANAN.

Court of Appeals of New York, January, 1873. 51 N. Y. 476.

The doctrine of the foregoing case of Rylands *v.* Fletcher of liability for dangerous things brought on one's premises, without negligence, denied in a case of boiler explosion.

Action for damages caused by the explosion of a boiler on the premises of defendant corporation, the Saratoga Paper Company, and injuring property belonging to the plaintiff. With the corporation the plaintiff had joined certain persons who as trustees and stockholders were interested in the same, and also certain persons named Clute who had made the boiler. Against the Clutes negligence was alleged; while the others were treated by the plaintiff as liable without negligence. The rest of the case appears in the opinion of the court.

Earl, C.,[1] for the Court. — Upon the first trial of this action, the presiding judge dismissed the complaint as against the defendants Clute, who manufactured the engine, and held that the other defendants were liable irrespective of negligence, and excluded all evidence to show that they were not guilty of negligence. For this error, upon appeal to the General Term, the judgment was reversed and new trial granted, the court holding that the defendants could be made liable only by proof against them of negligence. Upon the second trial, the presiding judge held, in accordance with the law as thus laid down by the General Term, and upon the question of negligence the jury decided against the Saratoga Paper Company and in favor of the other two defendants. The plaintiff claimed, as he did upon the first trial, that the defendants were liable without the proof of

[1] Commissioner of appeals, under special statute.

any negligence, and requested the justice so to rule, and the refusal of the justice to comply with this request raises the principal question for our consideration upon this appeal.

Upon the last appeal, the majority of the court held the law to be as it had been held upon the first appeal, but a new trial was granted for certain alleged errors in the charge of the justice, which will hereafter be considered. The claim on the part of the plaintiff is, that the casting of the boiler upon his premises by the explosion was a direct trespass upon his right of undisturbed possession and occupation of his premises, and that the defendants are liable just as they would have been for any other wrongful entry and trespass upon his premises. I do not believe this claim to be well founded, and I will briefly examine the authorities upon which mainly an attempt is made to sustain it.

In Farrand *v.* Marshall, 21 Barb. 409, it was held that a man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own. This is upon the principle that every man has the natural right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. He has a right to the support of the adjoining soil, and to that extent has an easement in his neighbor's soil, and when the soil is removed his easement has been interfered with. Where one adjoining owner thus removes the soil, he is not doing simply what he may with his own, but he is interfering with the right which his neighbor has in the same soil. This rule, however, as stated by Judge Bronson in Radcliff's Executors *v.* Mayor, etc. of Brooklyn, 4 Comst. 203, must undoubtedly be somewhat modified in its application to cities and villages. In Hay *v.* The Cohoes Company, 2 Comst. 159, the defendant, a corporation, dug a canal upon its own land for the purposes authorized by its charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon

lands adjoining. It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land. This is far from an authority for holding that the defendants, who placed a steam-boiler upon their lands, and operated the same with care and skill, should be liable for the damages caused by the explosion, without their fault or any direct or immediate act of theirs. It is true that Judge Gardner, in writing the opinion of the court, lays down broadly the principle that 'every individual is entitled to the undisturbed possession and lawful enjoyment of his own property,' citing the maxim sic utere tuo, etc. But this principle, as well as the maxim, as will be seen, has many exceptions and limitations, made necessary by the exigencies of business and society.

In Bellinger *v.* The New York C. R. R. Co., 23 N. Y. 47, it was decided that where one interferes with the current of a running stream, and causes damage to those who are entitled to have the water flow in its natural channel, but such interference is in pursuance of legislative authority granted for the purpose of constructing a work of public utility, upon making compensation he is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods. Judge Denio, in his opinion, referring to the maxim aqua currit et debet currere, says, it 'absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretence, and subjects him to damages at the suit of any party injured without regard to any question of negligence

or want of care.' The liability in such cases is based upon the principle that the interference is an immediate and direct violation of the right of the other riparian owners to have the water flow in its natural channel. No one has an absolute property in the water of a running stream. He may use it, but he must not, by his use of it, interfere with the equal right which other riparian owners have also to use it, and have it flow in its natural way in its natural channel.

In Pixley *v.* Clark, 35 N. Y. 520, it was held, that if one raises the water in a natural stream above its natural banks, and to prevent its outflow constructs embankments which answer the purpose perfectly, but by the pressure of the water upon the natural banks of the stream percolation takes place so as to drain [1] the adjoining lands of another, an action will lie for the damages occasioned thereby; and that it matters not whether the damage is occasioned by the overflow of or the percolation through the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream. This decision was an application of the maxim aqua currit et debet currere to the facts of that case. It was held that the liability was the same whether the water was dammed up and caused to overflow or to percolate through the banks of the stream. It was a case of flooding lands by damming up the water of a stream, and the liability of a wrong-doer in such a case has never been disputed.

In the case of Selden *v.* The Delaware and Hudson Canal Co., 24 Barb. 362, it was held that the defendant had the power, under its charter, to enlarge its canal; but that, though it possessed this power, and upon making compensation therefor, to take private property for that purpose, it was liable to remunerate individuals in damages for any injuries they might sustain as the consequence of such improvement; and that, if by means of the enlargement, a lawful act in itself, the lands of an individual were inundated, even though the work may have been performed with

[1] Sic, for drown.

all reasonable care and skill, it was a legal injury, for which the owner was entitled to redress. It may well be doubted if this decision can stand in view of the principles laid down in the case of Bellinger *v.* The New York Central Railroad Company, supra. Within the principles of that case, if the Delaware and Hudson Canal Company exercised a power conferred upon it by law in a lawful and proper manner, it could not be held liable for the consequential damages necessarily occasioned to the owners of adjoining lands. But if we assume, as was assumed at the General Term in that case, that the defendant did not have the protection of the law for the damages which it occasioned, then it was clearly liable. Its acts were necessarily and directly injurious to the plaintiff. It kept the water in its canal when it knew that the necessary consequence was to flood the plaintiff's premises. The damage to plaintiff was not accidental, but continuous, direct, and necessary. In such a case the wrong-doer must be held to have intended the consequence of his acts, and must be treated like one keeping upon his premises a nuisance doing constant damage to his neighbor's property.

In the case of McKeon *v.* Lee, 4 Rob. Superior Court R., 449, it was held, that the defendant had no right to operate a steam-engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them. This case was decided upon the law of nuisances. It was held that the engine and machinery, in the mode in which they were operated, were a nuisance, and the decision has been affirmed at this term of the court. The decision in this case, and in scores of similar cases to be found in the books, is far from an authority that one should be held liable for the accidental explosion of a steam boiler which was in no sense a nuisance. We are also cited to a class of cases holding the owners of animals responsible for injuries done by them. There is supposed to be a difference as to responsibility between animals mansuetae naturae and ferae naturae.

As to the former, in which there can be an absolute right of property, the owner is bound at common law to take care that they do not stray upon the lands of another, and he is liable for any trespass they may commit, and it is altogether immaterial whether their escape is purely accidental or due to negligence. As to the latter, which are of a fierce nature, the owner is bound to take care of them and keep them under control, so that they can do no injury. But the liability in each case is upon the same principle. The former have a known, natural disposition to stray, and hence the owner knowing this disposition is supposed to be in fault if he do not restrain them and keep them under control. As to the former, the owner is not responsible for such injuries as they are not accustomed to do, by the exercise of vicious propensities which they do not usually have, unless it can be shown that he has knowledge of the vicious habit and propensity. As to all animals, the owner can usually restrain and keep them under control, and if he will keep them he must do so. If he does not, he is responsible for any damage which their well-known disposition leads them to commit. I believe the liability to be based upon the fault which the law attributes to him, and no further actual negligence need be proved than the fact that they are at large unrestrained. But if I am mistaken as to the true basis of liability in such cases, the body of laws in reference to live animals, which is supposed to be just and wise, considering the nature of the animals and the mutual rights and interests of the owners and others, does not furnish analogies absolutely controlling in reference to inanimate property.

Blackstone (vol. 3, p. 209) says, 'that whenever an act is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass vi et armis will lie;' for 'the right of meum and tuum or property in lands being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil. Every entry,

therefore, thereon without the owner's leave, and especially contrary to his express order, is a trespass or transgression.' The learned author was here laying down the distinction between an action of trespass and trespass on the case, and asserting the rule that in the former action the injury must be direct and immediate, and accompanied with some force, whereas in the latter action it could be indirect and consequential. He was also manifestly speaking of a direct entrance by one upon the lands of another. He was laying down a general rule that every unauthorized entrance upon the land of another is a trespass. This was sufficiently accurate for the enunciation of a general rule. Judges and legal writers do not always find it convenient, practicable, or important, in laying down general rules, to specify all the limitations and exceptions to such rules. The rule, as thus announced, has many exceptions, even when one makes a personal entry upon the lands of another. I may enter my neighbor's close to succor his beast whose life is in danger; to prevent his beasts from being stolen or to prevent his grain from being consumed or spoiled by cattle; or to carry away my tree which has been blown down upon his land, or to pick up my apples which have fallen from my trees upon his land, or to take my personal property which another has wrongfully taken and placed there, or to escape from one who threatens my life. Bacon's Abridgment, Trespass, F. Other illustrations will be given hereafter.

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage, and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machineries, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lie

at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare.

I have so far found no authorities and no principles which fairly sustain the broad claim made by the plaintiff, that the defendants are liable in this action without fault or negligence on their part to which the explosion of the boiler could be attributed.

But our attention is called to a recent English case, decided in the Exchequer Chamber, which seems to uphold the claim made. In the case of Fletcher *v.* Rylands, 1 Ex. 265, Law Reports,[1] the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir and under part of the intervening land had been formerly worked, and the plaintiff had, by working lawfully, made in his own colliery and in the intervening land an underground communication between his colliery and the old workings under

[1] Ante, p. 405.

the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was contructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts and flowed, by the underground communication, into the plaintiff's mines. It was held, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused, upon the broad doctrine that one who, for his own purposes, brings upon his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. Mr. Justice Blackburn, writing the opinion of the court, says: 'The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more;' and he reaches the conclusion that it is an absolute duty, and that the liability for damage from the escape attaches without any proof of negligence. This conclusion is reached by the learned judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should

not be applied to inanimate property. That case was appealed to the House of Lords and affirmed, 3 H. L. [Law Rep.] 330,[1] and was followed in Smith *v.* Fletcher, 20 W. R. 987.

It is sufficient, however, to say that the law, as laid down in those cases, is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part. Angell on Water-courses, § 336; Lapham *v.* Curtis, 5 Vt. 371; Todd *v.* Cochell, 17 Cal. 97; Everett *v.* Hydraulic, etc. Co., 23 id. 225; Shrewsbury *v.* Smith, 12 Cush. 177; Livingston *v.* Adams, 8 Cowen, 175; Bailey *v.* Mayor, etc. of New York, 3 Hill, 531, s. c. 2 Denio, 433; Pixley *v.* Clark, 35 N. Y. 520, 524; Sheldon *v.* Sherman, 42 id. 484.

The true rule is laid down in the case of Livingston *v.* Adams as follows: 'Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable.'

In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence. Clark *v.* Foot, 8 J. R. 422; Stuart *v.* Hawley, 22 Barb. 619; Calkins *v.* Barger, 44 id. 424; Lansing *v.* Stone, 37 id.

[1] Ante, p. 405.

15; Barnard *v.* Poor, 21 Pick. 378; Tourtellot *v.* Rosebrook, 11 Met. 460; Batchelder *v.* Heagan, 18 Maine, 32. The rule, as laid down in Clark *v.* Foot, is as follows: 'If A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A. unless there was some negligence or misconduct in him or his servant.' And this is the rule throughout this country except where it has been modified by statute. Tourtellot *v.* Rosebrook was an action to recover damages caused by a fire communicated to the plaintiff's land from a coal-pit which the defendant lawfully set on fire upon his own land, and it was held that the burden was on the plaintiff to prove negligence on the part of the defendant. In Hinds *v.* Barton, 25 N. Y. 544, and Teall *v.* Barton, 40 Barb. 137, sparks were emitted from a steam-dredge used upon the Erie Canal, and they set fire to neighboring buildings, and although the sparks were thrown directly upon the buildings it was held that the defendant could be made liable only by proof of negligence. In Cook *v.* The Chamberlain Transportation Co., 1 Denio, 91, the buildings of the plaintiff were fired by sparks thrown thereon from defendant's steamboat upon Lake Champlain, and it was held that the defendant could be made liable only by proof of negligence. All these cases and the class of cases to which they belong are in conflict with the rule as claimed by the plaintiff. A man may build a fire in his house or his steam-boiler, and he does not become liable without proof of negligence if sparks accidentally pass directly from his chimney or smoke-stack to the buildings of his neighbor. The maxim of sic utere tuo, etc., only requires, in such a case the exercise of adequate skill and care.

The same rule applies to injuries to the person. No one in such case is made liable without some fault or negligence on his part, however serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liability for such injuries to the person.

It is settled in numerous cases, that if one driving along a highway accidentally injures another he is not liable without proof of negligence. Center *v.* Finney, 17 Barb., 94; Hammock *v.* White, 103 Eng. Com. Law, 587.

In Harvey *v.* Dunlop, Lalor's Supplement,[1] 193, the action was for throwing a stone at the plaintiff's daughter and putting out her eye. It did not appear that the injury was inflicted by design or carelessness, but did appear that it was accidental, and the court held that the plaintiff could not recover, laying down the broad rule that no liability results from the commission of an act arising from inevitable accident, or which ordinary human care and foresight could not guard against. In Dygert *v.* Bradley, 8 Wend. 469, the action was for running one boat against another in the Erie canal, and the court held that if the injury was occasioned by unavoidable accident, no action would lie for it; but if any blame was imputable to the defendant, he would be liable. In Brown *v.* Kendall, 6 Cush. 292,[2] the defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising his stick for that purpose, accidentally struck the plaintiff and severely injured him; it was held that he was not liable. In writing the opinion of the court, Chief Justice Shaw says: 'It is frequently stated by judges, that where one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These dicta are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional or careless.' 'We think, as the result of all the authorities, that the rule is that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable and the conduct of the

[1] Hill & Denio. [2] Ante, p. 191.

defendant was free from blame, he will not be held liable. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom.' So, too, contrary to what was held in an early English case, if one raise a stick in self-defence to defend himself against an assault and accidentally hit a third person, he cannot, in my opinion, be made liable for the injury thus, without fault or negligence, inflicted.

In Rockwood *v.* Wilson, 11 Cush. 221, Mr. Justice Thomas says: 'Nothing can be better settled than that if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence.'

In Bissell *v.* Booker, 16 Ark., 308, it was held that one who is hunting in a wilderness is not bound to anticipate the presence, within range of his shot, of another man, and that he is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware. See also the cases of Driscoll *v.* The Newark and Rosendale Co., 37 N. Y., 637.

In Spencer *v.* Campbell, 9 Watts & S., 32, a man drove a horse to defendant's steam grist-mill to get some grist which he had had ground, and he was thus lawfully upon defendant's premises and was just as much entitled to protection there as if he had been upon his own premises. While there the steam-boiler exploded and killed his horse, and the action was brought for the value of the horse; and it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill and diligence. I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff here, it should have been held in that case that the owner of the steam-boiler was absolutely liable, irrespective of any care, skill or diligence on his part, for any damage which the boiler by its explosion occasioned to any property lawfully in the vicinity. Within the rules laid down by

these authorities, the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident.

In support of the plaintiff's claim in this action the rule has been invoked that, where one of two innocent parties must suffer, he who puts in motion the cause of the injury must bear the loss. But, as will be seen by the numerous cases above cited, it has no application whatever to a case like this.

This examination has gone far enough to show that the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part. In this case the defendants had the right to place the steam-boiler upon their premises. It was in no sense a nuisance, and the jury have found that they were not guilty of any negligence. The judgment in their favor should, therefore, have been affirmed at the General Term, unless there were errors in the charge, or refusal to charge, of the judge who presided at the trial, and these alleged errors I will now briefly examine.

It is alleged that the judge erred in charging the jury that 'defendants are not liable for negligence or want of skill on the part of the manufacturers of the boiler in question not known to them;' 'that defendants are not liable except upon proof of negligence or unskilfulness on the part of the authorized servants or agents of the company;' 'that there is no proof of any relation between the plaintiff and defendant, Buchanan, creating any obligation or duty on the part of the latter toward the former;' 'that defendant, Buchanan, is not liable for any negligence or unskilfulness on the part of the Saratoga Company or on the part of the manufacturers of the boiler in question.' These are not

found in the charge, but were decisions made upon the motion for a nonsuit, and were not excepted to.

The judge charged the jury 'that if they were of opinion that the reduction by Goddard (the engineer and agent of the paper company, who had charge of the boiler) of the steam pressure from 120 to 110 was a proper, prudent and sufficient exercise of care and skill under the circumstances, that the defendants were not liable on account of leakage;' 'that the cold shut in the head that previously gave out was no evidence of the cold shut in the head that did give out;' 'that if Goddard told Bullard that it would be prudent to run the steam-boiler at 110, and if Bullard believed that and acted upon it, then he was not liable;' 'that if the jury found from the evidence that Goddard came to the conclusion that to reduce the pressure from 120 to 110 would render the use of the boiler prudent and safe, and communicated that idea to Bullard, he, Bullard, was not personally liable.' These charges were excepted to by plaintiff's counsel. These were requests to charge on the part of the defendants acceded to by the judge. Some of them should properly have been somewhat qualified and explained, and are therefore liable to some criticism. But we must look at the whole charge, and judge of it from its whole scope, and if, taking it all together, it presented the questions of law fairly to the jury so as not to mislead them, exceptions to separate propositions in it, or to detached portions of it, will not be upheld. As said by Chief Judge Church, in Caldwell *v.* New Jersey Steamboat Co., 47 N. Y., 282, 'If the charge as a whole conveyed to the jury the correct rule of law, on a given question, the judgment will not be reversed although detached sentences may be erroneous; and if the language employed is capable of different constructions, that construction will be adopted which will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been, misled.'

The judge in his charge submitted the whole question of negligence to the jury. He charged that the defendants

were liable for the omission of such care as men of ordinary prudence engaged in the use of such a steam-boiler in such business would exercise, and that they were liable for any imperfections in the boiler, which contributed to the explosion, which were known to them; but that if the explosion was caused by the cold shut in the head of the boiler which was imperceptible to the defendants or undiscoverable on examination or by the application of known tests, they were not liable. He charged the jury fully in reference to the leakage of the boiler, and his charge upon that subject was fully as favorable to the plaintiff as he could claim. He called the attention of the jury to all the facts connected with it and to what Goddard had told Bullard about it, and stated to them that they had a right to say, from all the facts, whether or not Bullard was chargeable with negligence in the use of the boiler, under the circumstances. I think, from the charge as made, the jury could not have failed to understand that the defendants were to be held liable for any defects in the manufacture of the boiler which they knew or ought to have known, and for any negligence in the use of the boiler which could be attributed to them.

The plaintiff requested the court to charge 'that the defendants cannot excuse or justify themselves in the use of the boiler in question, on the ground that the same was purchased of reputable manufacturers.' This the judge refused to charge and the plaintiff excepted. The principle of law involved in this request was fairly covered by the charge as made, and yet it may well be doubted whether the judge would have been justified in charging in the language of the request. The fact that the defendants bought the boiler of reputable manufacturers was one of the facts tending to a justification which the jury were to consider. It was not of itself a conclusive justification, and the judge did not charge that it was. If he had refused to charge that they could not justify on the sole ground that they had purchased it of reputable manufacturers, it would have been error. A charge in the very language of the request might

have misled the jury by taking from their consideration the fact that the boiler was bought from reputable manufacturers upon whose judgment, skill and integrity the defendants had the right to place some reliance.

I have, therefore, reached the conclusion that no error was committed upon the trial of this action, and it follows that the order of the General Term must be reversed, and the judgment entered upon the verdict must be

Affirmed, with costs.

WILSON *v.* NEW BEDFORD.

Supreme Court of Massachusetts, October, 1871. 108 Mass. 261.

The proprietor of a public reservoir, though properly constructed under authority of statute, is liable for damage done to the owner of adjoining lands by water collected within and percolating through the banks, or preventing the outflow of water from his own lands.

The case is stated in the opinion of the court.

Chapman, C. J., for the court. — The act of 1863, c. 163, for supplying the city of New Bedford with pure water, grants authority to the city to exercise the right of eminent domain by taking the land and streams therein named, erecting dams and laying water pipes. By § 6, the city is made liable to pay all damages that shall be sustained by any persons in their property by the taking of land, water or water rights, or by the construction of any dams, aqueducts, reservoirs, or other works for the purposes of the act. This provision is in conformity with the tenth article of the Declaration of Rights; and both the grant of authority and the obligation to make compensation are to have a reasonable interpretation.

The city has taken the stream mentioned in the petition, and erected a dam across it, thereby creating a reservoir.

The petitioner alleges that this reservoir has caused damage to him by reason of the percolation of water from the reservoir, underground, to his house cellar and barn cellar, about a thousand feet distant from the dam, and alongside of it, and preventing the natural passage of water underground into the natural stream on which the dam is constructed. The respondents contend that they are not liable to make compensation for an injury of this character.

It is true that the rights of neighboring proprietors of lands in underground waters which remain still, or naturally percolate through the soil without forming channels, are very different from their rights in watercourses. The percolating water belongs to the owner of the land, as much as the land itself, or the rocks and stones in it. Therefore he may dig a well, and make it very large, and draw up the water, by machinery or otherwise, in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land; and his neighbor may, by a wall or other obstruction, retain the water which is upon his own land, and prevent the water from coming into his soil. This principle was discussed in Greenleaf *v.* Francis, 18 Pick. 117; and afterwards in Chasemore *v.* Richards, 7 H. of L. Cas. 349; and also in several other cases in England and this country. But the present case is of a different character. The respondents have so raised their dam and reservoir as to cause an artificial pressure of the water through the soil, and by its action it has flooded the petitioner's cellars. Probably it cannot be ascertained precisely how it acts underground.

In this Commonwealth, complaints under our mill acts have for many years presented cases quite similar to this. Lands are overflowed by mill ponds, and instead of an action at common law a process is provided by statute for the recovery of damages, quite similar to the process in this case. The question what kind of damages should be esti-

mated has been discussed and settled in several cases. In Monson & Brimfield Manufacturing Co. *v.* Fuller, 15 Pick. 554, it was decided that damages occasioned by the percolation of water through the earth from the pond to neighboring uplands, and causing them to produce poorer grass, or a smaller quantity of grass, could be recovered. In Fuller *v.* Chicopee Manufacturing Co., 16 Gray, 46, it was decided that damages occasioned by raising the pond, so as to affect injuriously the water of the plaintiff's well, were recoverable; and no distinction was made as to whether it affected the well by overflowing or percolation. This principle is just; for the water often injures land which it never overflows; and where the soil is porous, the water may by percolation render a dwelling house uninhabitable, or destroy the value of large tracts of land. Upon the same principle, it was held in Ball *v.* Nye, 99 Mass. 582, that it was actionable to cause filthy water to percolate from the defendant's vault through his own soil and thence into his neighbor's soil, and thus injure his neighbor's well and cellar. In Pixley *v.* Clark, 35 N. Y., 520, the same principle was held in regard to water which percolates through the banks of a reservoir created by erecting a dam across a stream, and damages the plaintiff's land. Rylands *v.* Fletcher, Law Rep. 3 H. of L. 330,[1] affirming the decision of the Exchequer Chamber, states the same principles, in application to a reservoir created artificially, from which the water flowed through some passages apparently filled up, and long disused, into the plaintiff's mine. Lord Cranworth, in delivering his opinion, said: 'If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.' He distinguishes between natural percolations and that which is caused artificially. On this point he says: 'If water naturally rising

[1] Ante, p. 405.

in the defendant's land had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint.' 'But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.'

The cases cited from Vermont are, to some extent, in apparent conflict with these authorities. They do not seem to distinguish, as these authorities do, between natural and artificial causes of injury. We think the petitioner's claim is not only sustained by authority, but is founded on justice. He ought to be compensated for such an injury as the petition describes, and the law would be defective if it failed to give him a remedy.

. . . . . .

Case to stand for trial.

NEGLIGENCE.

DEAN *v.* KEATE.

King's Bench, Nisi Prius, May, 1811. 3 Campb 4.

It is negligence for an unskilled person to undertake without excuse a service requiring skill.

This was an action for the improper treatment of a horse, let to hire by the plaintiff to the defendant.

The defendant jobbed a pair of coach horses of the plaintiff. One of them being slightly indisposed, the defendant wrote a prescription for him. This medicine was not of itself calculated to do any injury; but after the horse had swallowed it, the defendant put him into harness, gave him strong exercise, and kept him exposed to the inclemency of the weather. In consequence of this treatment the animal was seized with an inflammation in the intestines. The defendant then, without consulting a veterinary surgeon, very imprudently prescribed a stimulating dose of opium and ginger, and the horse soon after it died in great agony. Medical advice was called in when it was too late.

Lord Ellenborough (to the jury). — The question is, whether the defendant has been guilty of gross negligence with respect to the horse. Had he called in a farrier, he would not have been answerable for the medicines the latter might have administered; but when he prescribes himself, he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that

degree of care which might be expected from a prudent man towards his own horse, and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff.

Verdict for plaintiff.

DIXON *v.* BELL.

King's Bench of England, Trinity Term, 1816. 5 Maule & S. 198.

The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care.

Case. The plaintiff declares that the defendant was possessed of a gun, then being in a certain messuage, situate, &c.; and that he, well knowing the same to be loaded with powder and printing types, wrongfully and injuriously sent a female servant to the said messuage, to fetch away the gun so loaded, he well knowing that the said servant was too young, and an unfit and improper person to be sent for the gun, and to be intrusted with the care or custody of it; and which said servant afterwards, and while she was so sent and intrusted by the defendant, and had the custody of the said gun accordingly, carelessly and improperly shot off the same, at and into the face of the plaintiff's son and servant, and struck out his right eye and two of his teeth, whereby he became sick, &c., and was prevented from performing his lawful business, and the plaintiff was deprived of his service, and put to great expense in procuring his cure, &c. There was a second count, for taking such improper care of the gun, knowing that it was loaded, that the gun was afterwards discharged against the plaintiff's son, &c. Plea, not guilty. At the trial, before Lord Ellenborough, C. J., at the last Middlesex sittings, the case was thus: The plaintiff and defendant both lodged at the house of one Leman, where the defendant kept a gun

loaded with types, in consequence of several robberies having been committed in the neighborhood. The defendant left the house on the 10th of October, and sent a mulatto girl, his servant, of the age of about thirteen or fourteen, for the gun, desiring Leman to give it her, and to take the priming out. Leman accordingly took out the priming, told the girl so, and delivered the gun to her. She put it down in the kitchen, resting on the butt, and soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a child between eight and nine, saying she would shoot him, and drew the trigger. The gun went off, and the consequences stated in the declaration ensued. There was a verdict for the plaintiff, damages £100. The Attorney-General moved for a new trial, on the ground that the defendant had used every precaution which he could be expected to use on such an occasion; and, therefore, was not chargeable with any culpable negligence.

Lord Ellenborough, C. J. — The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Leman was not sufficient; consequently, as, by this want of care, the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable.

Bayley, J. — The gun ought to have been so left as to be out of all reach of doing harm. The mere removal of the priming left the chance of some grains of powder escaping through the touchhole.

Rule refused.

BYRNE *v.* BOADLE.

Court of Exchequer, Michaelmas Term, 1863. 2 Hurl. & C. 722.

The unexplained falling of a barrel out of the loft window of a warehouse, upon the street, to the hurt of a person passing by, is presumptively due to negligence.

Declaration. For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that, by and through the negligence of the defendant by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified. Plea, not guilty.

At the trial before the learned assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follows: A witness named Critchley said: 'On the 18th July, I was in Scotland Road, on the right side going north; defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out

until after the accident.' The plaintiff said: 'On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight.' (He then described his sufferings.) 'I saw the path clear. I did not see any cart opposite defendant's shop.' Another witness said: 'I saw a barrel falling. I don't know how, but from defendant's.' The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned assessor was of that opinion, and non-suited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with £50 damages, the amount assessed by the jury. Rule nisi to enter verdict for the plaintiff.

Pollock, C. B. — We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured

by something falling upon him, I think the accident alone would be prima facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this; a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

BRAMWELL, B. — I am of the same opinion.

CHANNELL, B. — I am of the same opinion. The first part of the rule assumes the existence of negligence, but takes this shape, that there was no evidence to connect the defendant with the negligence. The barrel of flour fell from a warehouse over a shop which the defendant occupied, and therefore prima facie he is responsible. Then the question is, whether there was any evidence of negligence, not a mere scintilla, but such as in the absence of any evidence in answer would entitle the plaintiff to a verdict. I am of opinion that there was. I think that a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it. I agree that it is not every accident which will warrant the inference of negligence. On the other hand, I dissent from the doctrine that there is no accident which will in

itself raise a presumption of negligence. In this case I think that there was evidence for the jury, and that the rule ought to be absolute to enter the verdict for the plaintiff.

Pigott, B. — I am of the same opinion.

Rule absolute.

ELLIOTT *v.* CHICAGO, MILWAUKEE, & St. PAUL RAILWAY COMPANY.

Supreme Court of the United States, October, 1893. 150 U. S. 245.

In a clear case, where a contrary verdict would be set aside, the court may itself pronounce on the existence of negligence.

To attempt to cross a railroad track without looking to see whether cars are coming, is negligence, especially if it be known that cars close at hand are at the time moving on the track.

Action in Dakota Territory for damages against a railway company for causing the death of the plaintiff's husband, by negligence. The case is stated in the opinion of the court.

Mr. Justice Brewer, for the court. — The question in this case is as to the liability of the company for the death of John Elliott. The company made three defences: One, that it was guilty of no negligence; second, that if there were any negligence, it was that of a fellow-servant; and third, that Elliott was guilty of contributory negligence. The Supreme Court of the Territory, in its opinion filed when the case was first in that court, considered the last two defences as sustained, and because thereof reversed the judgment in favor of the plaintiff. All of them have been presented and fully argued in this court, but as we consider the third sufficient, it is unnecessary to notice the first two. We are of opinion that the deceased was guilty of contributory negligence, such as to bar any

recovery. It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. Railroad Co. *v.* Houston, 95 U. S. 697; Schofield *v.* Chicago, Milwaukee, & St. Paul Railroad, 114 U. S. 615; Delaware, Lackawanna, &c. Railroad Co. *v.* Converse, 139 U. S. 469; Aerkfetz *v.* Humphreys, 145 U. S. 418.

What then are the facts concerning the accident? It took place at a station called Meckling, a hamlet of two or three houses, and of so little importance that at the time the company had no station agent there. The main track of the defendant's road ran eastward and westward in a straight line, and the ground was level. On the north side of this track was a siding seven hundred and twenty-eight feet in length from switch to switch, and distant from the main track at the maximum sixteen feet. This siding was the only extra track at the place. About one hundred feet east from the west switch was the depot, on the south of the track, and some ten feet therefrom. Two hundred feet east of that was a small car house, sixteen feet from the track. These were the only buildings on the depot grounds. No cars were standing on the track or siding. The day was clear, and there was nothing to prevent the deceased from seeing all that was going on. He was foreman of a section gang, and had been working on this track for ten or more years. In expectation of a coming freight train his men had placed their hand-car on the siding. The train was due at 8.25 A.M., but was perhaps five or ten minutes late. It came from the west, and at this station made a double flying switch. This was accomplished by uncoupling the train at two places, thus breaking it into three sections. The first section, consisting of the engine and eighteen cars, moved along the main track; but before the balance of the train reached the switch — its speed having been

checked by brakes — that was turned so that two cars, constituting the second section and under the control of a brakeman, passed on to the siding; the rear section having been still further checked by brakes, the switch was reset so that it passed on to the main track, following the first section. The rear section consisted of a flat car, a box car, a caboose, and an empty passenger coach, and was under the care of the conductor and one brakeman. As the second section was thrown by the flying switch on the siding, two of the men started to push the hand-car towards the east, so as not to be struck by the approaching freight cars. The deceased at the time the first section passed the car house was standing some sixteen feet west thereof, and four or five feet from the track, talking with one of his men. After a short conversation the latter started towards the depot, while the deceased walked eastward along the track until he had passed a few feet beyond the car house, when he started hastily toward the siding. His attention had apparently been called by the approach of the two cars on the siding to the hand-car, for he made some call to the men who were pushing that hand-car. He crossed the main track diagonally, his face turned eastward. The rear section, coming along from the west, struck and crushed him. This rear section, when it passed the depot, was moving slowly, not faster than a walk, as one of the witnesses testified. That it was moving quite slowly is evident from the fact that it came to a stop after two cars and the caboose had passed over the body of the deceased, and this though no special effort was made to check them after the deceased had been struck, the conductor and brakeman on that section being unaware of the accident. When he started to cross the track, this approaching section was not to exceed twenty-five or thirty feet from him.

It thus appears that the deceased, an experienced railroad man, on a bright morning, and with nothing to obstruct his vision, starts along and across a railroad track with which he was entirely familiar, with cars approaching and only

twenty-five or thirty feet away, and before he gets across that track is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travellers on the highway and employees on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the hand-car out of the way of the section moving on the siding. But whatever his motive, the fact remains that he stopped on the track in front of an approaching train, without looking, or taking any precautions for his own safety.

This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south side of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger.

The trial court was right in holding that he was guilty of contributory negligence. So without considering the other questions presented in the record, the judgment will be

Affirmed.

On the point that the deceased was advancing to save the men on the hand-car from peril, compare Eckert *v.* Long Island R. Co. 43 N. Y. 502; Torts (Students' Series), 338, 5th ed.

CASS *v.* BOSTON & LOWELL RAILROAD COMPANY.

Supreme Court of Massachusetts, January, 1867. 14 Allen, 448.

A railroad company acting as a warehouseman is liable only for ordinary diligence suited to the case.

Action of contract against a railroad company for failing to deliver to the plaintiff a tub of sugar consigned to him and received by the company at their freight depot in Boston, its destination. It had been there some eight days, when on the plaintiff's calling for it it was missing. Evidence that the company had exercised the care usual by railoads in such cases was excluded, and the company excepted. Verdict for the plaintiff.

Colt, J., for the court. — The plaintiff seeks to charge the defendants upon an undertaking, for a legal consideration, to deliver to him in Boston the property named in his declaration, alleging the receipt of the property by the defendants, and their neglect and refusal to deliver the same when duly demanded. The defendants are not alleged in the declaration to be common carriers, but their liability is put upon the ground of bailees for hire or warehousemen. In their answer the defendants admit that they received the property; they do not admit or deny the property of the plaintiff; and they allege that without any neglect or default or carelessness whatever on their part, and while they were exercising due care in respect to it, the tub of sugar was stolen from their warehouse; and they deny the existence of any other agreement between them and the plaintiff than such as may be inferred from the facts set forth in the answer.

Upon these pleadings no question was raised as to the

burden of proof. If the defendants exercised due and ordinary care in the custody of the property they cannot be charged for its loss. What constituted such care was a question of fact to be judged of with reference to all the circumstances, and especially with reference to the degree of care which other persons engaged in similar business in the vicinity were in the habit of bestowing on property similarly situated. The standard of ordinary care varies necessarily in different localities. One degree of diligence would be required for the city, and a less or greater for the country; depending on a great variety of circumstances. The defendants offered to prove that there was exercised by them in relation to this property that care which other railroad corporations in Boston usually exercised in relation to such property. The court excluded this evidence, and on this ground the exceptions are well taken. Lichtenhein *v.* Boston & Providence Railroad, 11 Cush. 70; Brown *v.* Waterman, 10 Cush. 117; Story on Bailm. §§ 11, 454.

Exceptions sustained.

GRAHAM *v.* GAUTIER.

Supreme Court of Texas, 1858. 21 Texas, 111.

A physician is bound to exercise ordinary skill, and also care and diligence in his practice; but evidence that he is a person of ordinary skill, care and diligence in his profession does not raise a legal presumption that he exercised the same in a particular case.

Action by a physician for services in attending upon the plaintiff's slaves in sickness. Defence that the plaintiff was guilty of negligence therein, whereby he caused the death of ten of the said slaves, and claim for damages therefor by the defendant.

The judge instructed the jury in substance as follows: That if the plaintiff was a physician of ordinary skill, he was entitled to recover for his services; that the plaintiff

would be responsible in damages for lack of ordinary skill, but not for lack of extraordinary skill; that on proof by the plaintiff of his skill as a physician, he would not be required to give further proof of skill in the particular case, but to defeat recovery by him, or to enable the defendant to recover damages against him in the suit, on the ground of unskilfulness, it was for the defendant to prove the same.

The defendant asked for certain instructions which were refused; among them the following in substance: That if the plaintiff as a physician undertook the service in question, and did not perform it with proper skill and knowledge, the defendant was not liable; that if the plaintiff was employed as a physician for and undertook the service in question, and did not perform his duty with diligence and skill, he was liable to the defendant for the damage thereby caused; that if the plaintiff treated the slaves for a disease they did not have, and if a physician of ordinary care, skill, and judgment would have distinguished the disease under which they were laboring and treated them in a different manner, the plaintiff would be liable for the damage done to the defendant in the loss of the slaves.

Verdict for plaintiff, and motion for new trial overruled.

Roberts, J., for the court. — This case involves the rights and liabilities of medical practitioners, called in this country by the appellation of physicians. In England, physicians are a class of persons who have a diploma from a College of Physicians, and are entitled to the honorary distinction of Doctor of Medicine. They could not maintain suits for their fees by the Common Law any more than could barristers at law. Lipscombe *v.* Holmes, 2 Campb. 441; Chorley *v.* Bolcot, 4 T. R. 317. Apothecaries and surgeons could maintain actions for their medicines and services, and were liable to be sued for any damage resulting from a want of ordinary care, diligence and skill in their professional employment. Slater *v.* Baker, 2 Wilson, 359; Seare *v.* Prentice, 8 East, 348; 4 Id. 448.

In the American States these professions have been generally blended, particularly in their early settlement; and medical bills are allowed to be sued for and recovered in our courts. Hewitt *v.* Charier, 16 Pick. R. 353; Mays *v.* Hogan, 4 Tex. R. 26; Parsons on Cont. 539. Being thus entitled to a compensation, they are bound to the exercise of ordinary care, diligence and skill in what they professionally undertake to perform; and if damage ensue from a want of this, they are liable to the party injured. 3 Black. Com. 122; Hewitt *v.* Charier, 16 Pick. 354; Landon *v.* Humphrey, 9 Conn. 209; Howard *v.* Grover, 28 Maine, 97.

In 1837, the Congress of the Republic passed a law establishing a Board of Medical Censors, for the purpose of granting licenses to practising physicians; which act provided that only such licensed persons should be capable of collecting their medical bills. This Medical Board was not kept up, and the act thereby became inoperative and was formally repealed in 1848.

This leaves physicians without any legal establishment as a class, as they existed in England and in many of the American States, nor are they recognized as a class otherwise than indirectly; as by being exempt from serving on juries, etc. Hart. Dig., Art. 1641.

Then not only the practice of blending the various branches of the profession, but also the fact that they are not legally created as a class, make it consistent with the principle to place physicians on the same footing with attorneys, factors, pilots, and other persons undertaking to perform services which require skill, for reward. Their employment, and their duty under it, are liable to be varied by innumerable circumstances of time, place, emergency and the like; but ordinarily the rule, laid down above, would determine the limits of their responsibility. The care, diligence and skill required, relate to their professional duties, and not to nursing and providing necessaries and comforts.

The testimony shows that these negroes were taken sick

in Malagorda county, with typhoid fever, and then measles upon that, and were first attended to by Dr. Fisher who is said to have pronounced it cholera. They were moved while sick to the McNeal place, when Dr. Gautier was called to see them; and while he was attending on them they were moved to Hinckle's place. The idea of their having some contagious disease caused them thus to be moved from place to place. The houses in which they were lodged were open, the weather was not good, they were not well provided with bedding and clothing, and were left in these outhouses mainly to themselves, apart from any white family to see that they were properly nursed and provided for (the white family being sick at another place at the same time). It would have been rather a matter of astonishment if all these negroes had survived under such circumstances, with the best medical skill and professional attention. The physician was not bound to nurse them and provide for them. It was his business to instruct others how to do it.

The court below charged the jury fully as to the degree of skill necessary to be exercised by a physician, but refused to charge anything in reference to the care and diligence which the law imposes on him. Skill, in its broadest sense, might be understood to include the others; but not necessarily, or even usually so. A man may be very skilful, without being very diligent or careful. Yet skilful treatment as a physician would usually be understood to include all these qualities. A physician might prescribe with great skill, when he came to see his patient, but be negligent and irregular in coming, and might not be careful enough in giving directions as to the management of the case in his absence.

The evidence upon the subject of Dr. Gautier's care and diligence was somewhat conflicting. It was stated by N. B. Gorsuch that he came frequently and gave about the same attention ordinarily shown by physicians. On the other hand, it was shown that he only stayed two hours at

a time, and was not in the house much with the negroes when he came; and Dr. Chinn's testimony shows that very great diligence and care were required of any one who would undertake to attend to them as a physician. However improbable it might appear to the judge that an impartial jury would, under all the circumstances, make the physician pay for the loss of these exposed and neglected negroes, — neglected and exposed by the misfortune rather than the fault of the owner,— it was the right of the party to have the law charged, in its full extent, so as to submit to the jury whether or not Dr. Gautier had used ordinary care and diligence, as well as skill in his treatment. This was a question which arose upon his petition for his medical bill, as well as upon Graham's plea of reconvention for damages. We think the court erred in not giving such charge when requested so to do by appellant.

It may be well to remark in reference to another part of the charge of the court, that the fact that a man is a physician of ordinary skill being proved does not raise a legal inference, as is supposed by the charge, that the particular services in any one case were skilfully rendered by him. It is a natural presumption not legal. It is evidence of that fact, and practically it may often be the only attainable evidence of it. But there is no rule of law giving it artificial weight as a legal presumption, or making it prima facie evidence. The question at issue was, the value of the services charged in the bill. Proof of his being a physician of ordinary skill will be an element in the evidence to establish the value charged, and it will ordinarily satisfy the mind of the value as alleged, if shown to be the usual charges, unless there be something proved rebutting such presumption.

The duty and responsibility of a physician is well stated by a judge in Pennsylvania: 'It is a rule of law, that a medical practitioner never insures the result, but simply engages that he possesses a reasonable degree of skill, such as is ordinarily possessed by a profession generally, and to

exercise that skill with reasonable care and diligence; and again, to exercise his best judgment, but is not responsible for a mistake of judgment, or for the result if he should happen to be mistaken.' Such are the rules applicable to the ordinary, implied undertaking of a physician. They may be varied by special circumstances or agreements.

The court did not err in holding that the plaintiff was entitled to open and conclude the argument of the case. The admission of defendant was so qualified as to avoid admitting the plaintiff's cause of action as set out in the petition, and without that he could not rightfully claim the opening and conclusion. Judgment is

Reversed and cause remanded.

NEW YORK & WASHINGTON TELEGRAPH COMPANY *v.* DRYBURG.

Supreme Court of Pennsylvania, 1860. 35 Penn. St. 298.

Error due to negligence in the transmission and delivery of a telegraphic message, resulting in damage to the addressee, makes the telegraph company liable to him.

Action for damages against a telegraph company by reason of an error, due to negligence, in a message sent by the company to the plaintiff. The message as given to the company for transmission requested the plaintiff, a florist, to send to Robert Le Roy, the sender of the message, 'two hand bouquets' of an expensive cost named. As delivered to the plaintiff the message read 'two hundred bouquets' of such cost. The plaintiff accordingly cut and procured the amount of flowers supposed to be required, and afterwards, upon telegraphing for particulars of disposition, learned of the mistake in the answering telegram.

The blank on which the message was sent contained a provision that, in order to prevent mistakes, important

messages 'ought to be repeated,' and that the company would not be liable for losses by reason of 'mistakes in the transmission or delivery' of messages not repeated. The message in question was not repeated, nor did the company request that it be repeated. The same was true of the subsequent telegrams. The operator who misread the message was a skilful man, and considered that the word intended for 'hand' was written 'hund' and hence was an abbreviation for 'hundred.'

Verdict for the plaintiff under instructions by the judge, subject to the opinion of the court upon the question of law whether upon the whole case the plaintiff was entitled to recover. Judgment for the plaintiff on the point reserved. Exceptions by the defendant.

Woodward, J., for the court. — The telegraph company did not send Le Roy's message as he wrote it. If written as the company's agent read it, the word hand was written hund; and if the company had sent the word hund to Dryburg, they would have been in no fault. Their agent, however, assumed that hundred was meant, and accordingly added the three letters r e d, which did all the mischief. We do not understand that there was any dot after the letters hund, to indicate a contraction; so that the agent's inference that hundred was the word meant, was entirely gratuitous.

The wrong, then, of which the plaintiff complains, consisted in sending him a different message from that which they had contracted with Le Roy to send. That it was a wrong is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is intrusted to them, their obligations, as far as they reach, spring from the same sources, — the public nature of their employment, and the contract under which the particular duty is assumed. One of the plainest of their obligations is, to transmit the very message pre-

scribed. To follow copy, an imperative law of the printing office, is equally applicable to the telegraph office.

But when they violate this duty, whether negligently or wilfully, are they responsible to the party to whom the erroneous message is addressed? That is the exact question upon this record. That the defendants would be responsible to Le Roy, and that he would be responsible over to Dryburg, are not contested, though, perhaps, not conceded points; but that the company are liable to Dryburg, is resisted on several grounds.

In the first place, it is said, that the case belongs to that class of torts in which malice is the gist of the action. This is a mistake. 'The narr. lays the duty to transmit the message as it was received, and assigns, as the breach, that it was transmitted, erroneously, untruly, and carelessly.' No malicious intent is alleged, nor was it necessary that one should be alleged or proved. It is enough that negligence is charged and proved. It is settled, upon abundant authority, that incorporated companies may be sued in their corporate character, for damages arising from neglect of duty, and for trover: 1 Chitty's Pl. 68; Turnpike Company *v.* Rutter, 4 S. & R. 6; Fowle *v.* Common Council of Alexandria, 3 Peters, 409; Bushel *v.* Insurance Company, 15 S. & R. 173. And a corporation is liable in tort for the tortious act of its agent, though the appointment of the agent be not under seal, if the act be done in the ordinary service. Smith *v.* Bellingham Gas-Light Company, 1 Adol. & Ellis, 526.

Apart, however, from corporation law, it is said, in the next place, that, upon the general principles of agency, the company can be held answerable to Le Roy only. That the relation of principal and agent existed between him and the company there can be no doubt; but I do not think it equally clear that that relation was not established between Dryburg and the company. Telegraph companies are, in some sort, public institutions — open alike to all; and are largely used in conducting the commerce of the country.

The banks decline to act upon their authority, and doubtless individuals may also decline: but when a man receives a message at the hands of the agent of such a company, and does act upon it, especially if, as Dryburg did, he use the same medium for responding to the message, it seems reasonable that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives, as of him who sends the message. In point of fact the fee is often paid on delivery; and I am inclined to think the company ought to be regarded as the common agent of the parties at either end of the wire.

But however this may be, regarding the company as alone the agent of the sender of the message, is it to be doubted that an agent is liable for misfeasance, even to third parties? For nonfeasance, I agree, the agent is responsible only to his employer, because there is no privity of consideration betwixt the agent and a third party. The remedy in such cases must be sought in the maxim respondeat superior; but, even to this rule, there is an exception in the instance of masters of ships, who, although they are the agents or servants of the owners, are also, in many respects, deemed to be responsible as principals to third persons, not only for their own negligences and nonfeasances, but for those of subordinate officers and others employed under them. The general rule, however, was laid down by Lord Holt in Lane *v.* Sir Robert Colton, 12 Mod. R. 488, in these words: 'A servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrong-doer.' s. c., 1 Ld. Raym. 646. The compilers have taken the rule from this source, and the cases cited by them show that it has generally been followed. See Paley on Agency, p. 396 et seq., and Story on Agency, §§ 308, 314, and 315, and the cases in notes.

The case of Camp *v.* The Western Union Telegraph Company, 6 Am. Law Register, 443, does not affect this

principle, as we apply it here, for there the action was by the sender of the message, and it appeared that the message was sent subject to the express condition, that defendant would not be liable for mistakes arising from any cause, unless the message was repeated by being sent back. This company had such a rule also; but they charge fifty per cent advance upon the usual price of transmission, where the sender demands that the message be repeated back to the first operator, and Le Roy did not pay it. If it be granted that, in consequence of his not purchasing this security against mistakes, he could not hold the company liable, it does not follow that Dryburg cannot. He did not know whether the message had been repeated back to Le Roy or not. He received it as the company delivered it to him, and it is very material to observe that the mistake was not due to what has been called the infirmities of telegraphing, but to the improper liberties which the operator took with the text before him. The magic power which presides over the wires performed its duty faithfully, and bore the very message it was bidden to bear, but the human agent sent a different message from that which he was commanded to send. This is the misfeasance the plaintiff complains of.

The company claimed that their operator was a skilful and careful one. Then his negligence in this instance was the more apparent and inexcusable. If the handwriting was so bad that he could not read it correctly, he should not have undertaken to transmit it; but the business of transmission assumed, it was very plainly his duty to send what was written. It was no affair of his, that the message would have been insensible. Messages are often sent along the wires that are unintelligible to the operator. When he presumed to translate the handwriting, and to add letters which were confessedly not in it, he made the company responsible to Dryburg for the damages that resulted from his wrong-doing.

We do not conceive it necessary to go any farther in the

discussion of this case. There are several errors assigned to which we have not specifically alluded, but we see nothing in them to require a reversal of the judgment.

Judgment affirmed.

MILLER *v.* PROCTOR.

Supreme Court of Ohio, December, 1870. 20 Ohio St. 442.

If, in investing or changing the investment of trust funds, trustees act with ordinary prudence, care, and skill, on questions of law taking the advice of a lawyer, they will not be liable for their mistakes.

Error to the Court of Common Pleas of Lawrence County affirming a judgment of the Probate Court, which allowed the defendants in error, executors of John Chaplin, deceased, a credit for certain losses incurred by them in the management of the estate of the decedent by them as trustees. To this credit certain legatees, now plaintiffs in error, excepted. The facts appear in the opinion of the court.

Welch, J., for the court.— The defendants, who were executors of the last will and testament of John Chaplin deceased, and also testamentary guardians of the minor legatees, were directed by the will to put at interest certain moneys of the estate, either by deposit in a bank, or by loan, 'well secured by mortgage on real estate,' until the youngest legatee should become of age, covering a period of some fourteen years.

The money came to the hands of the executors in three several parcels, and was loaned by them to one Rogers upon three several mortgages on real estate. These mortgages were sufficient security for the money, except that in one of them there was a mistake in the description of the mortgaged property, which mistake, however, could and would readily have been corrected had it been discovered. Each of these loans ran for one year only. After the maturity

of one of the loans, and while the other two still remained undue, at the request of Rogers, and to accommodate him, the executors released these mortgages and cancelled the mortgage notes, taking from Rogers a new note for the entire sum, which he secured by a mortgage on other real estate, called in the proceedings the 'Hepler mortgage.' The property covered by this latter mortgage was insufficient in value to secure the amount loaned, and was, moreover, subject to a prior mortgage, a fact which the executors failed to ascertain, having omitted to examine the records for that purpose. Upon discovery of the insufficiency of the Hepler mortgage, the executors made an arrangement with Rogers, by which they released the same, and again took a new mortgage. This last mortgage was upon Rogers' undivided half of a certain mill lot with the mill erected thereon, which was at the time owned and used by Rogers and his brother as partners in the milling business, but the title to which stood upon the record as that of tenants in common. The property thus mortgaged was sufficient in value to secure the loan; and Rogers himself, as well as the firm of Rogers & Brother, was solvent and good for the debt. In taking the mill mortgage, the executors, who were not learned in the law, exercised their best judgment, and acted in good faith, under the advice of counsel. Their counsel was a lawyer in good standing in his profession. He testifies that he had long resided in the town where the mill is situate, and was acquainted with property there, and with the Rogerses, and that he advised the executors that the security was good. He also testifies that the executors were 'very cautious, and took a great deal of pains to get the very best security.' It is true that he says his opinion was not asked as to the liability of the property for debts of the partnership. He probably knew the fact that it was partnership property. If he did not, the executors probably did not, for they were non-residents of the town. The truth seems to be, that the rule of equity which subjects such property to the payment of partnership liabilities, was

utterly unknown to the executors, and if known to their attorney did not occur to him at the time.

Subsequently the firm of Rogers & Brother proving to be insolvent, an action was brought by the executors to foreclose the mortgage. To this action the creditors of the firm of Rogers & Brother were made parties, and the mill property was by decree of court subjected to the payment of the partnership debts, for which it proved insufficient, and Rogers being insolvent, the mortgage debt was lost. After bringing their action upon the mortgage the executors were offered in security of the loan, the note of a third person, which was in fact secured by mortgage (the executors, however, not being informed that it was so secured), on condition that they would release the mortgage upon the mill property. Under the advice of their said attorney they refused this offer. Had they accepted it the debt would have been saved. They refused the offer in good faith, and in the belief that the mill mortgage was good, or at least was better than the security so offered.

In their account filed in the Probate Court for final settlement the executors credited themselves with the amount of this loss, being with the interest some $6000. To this item in the account, the legatees, the present plaintiffs in error, excepted. The exception was overruled by the Probate Court, and the cause appealed to the Common Pleas, where a like judgment was entered. To reverse the judgment of the Common Pleas a petition in error was prosecuted by the legatees in the District Court, and the cause was there reserved for decision here.

The case presents the single question whether the executors have been guilty of a breach of trust. In other words, have they acted within the scope of their authority, and exercised such prudence, care and diligence in the management of this fund, as men of ordinary diligence, care and prudence manifest in like matters of their own. If they have not, then the loss shall fall upon them; otherwise it should be borne, as losses generally are, by the owners of the fund.

It is claimed, in the first place, that the executors rendered themselves absolutely liable to account for the fund, by their release of the first three mortgages, which were amply sufficient security, and also by taking the Hepler mortgage without ascertaining the true value of the property or the existence of a prior mortgage upon the property; and that however fully and well they may have discharged their duty in taking the final mortgage upon the mill property, this will not discharge them from their liability.

The answer to this claim, it seems to us, is that the will prescribes no limits as to the length of time for which any loan should run, but entrusts to the executors a discretion, to loan it for longer or shorter periods, and to collect and reloan it, as they might deem proper. They had a right at any time, either before or after the money became due, to receive payment of it from Rogers, and reloan it to him upon new securities, or, which would seem to be in effect the same thing, to substitute new securities for the old ones. The final loan upon the mill-mortgage must, therefore, be looked upon in the light of an original loan. Had the executors made no loan of the money at all, but kept it in their own hands, down to the date of the mill mortgage, surely the loan upon that mortgage, if well and judiciously made, would have discharged them from all loss happening therefrom without their fault; and yet in that case their prior breach of trust, in failing to loan the money at all, would have been at least as great, and as undeniable, as in the present case.

But it is said, even if the mill mortgage is to be considered as an original transaction, that the executors were guilty of a breach of trust in taking it, first, because the mill property was not 'real estate,' and, therefore, not within the scope of their authority; and, secondly, being partnership property, and as such liable primarily to the satisfaction of partnership debts, the security was insufficient, and such as no prudent man would accept.

We are clear in the opinion that the first of these posi-

tions is not well taken. Real property, the title to which is vested in the members of a firm, but which is in fact owned and used by the firm as partnership property, though regarded in equity as part of the assets of the concern, and as such subject to some of the incidents of personal property, is nevertheless in law real estate, and can only be mortgaged or conveyed as such. A mortgage upon such property is not a mortgage upon personal property, but upon real estate.

The second position assumed involves more of difficulty. If the executors, at the time of taking the mortgage upon the mill property, were aware that it was in fact owned and used by the firm as partnership property, and were also aware of the law which holds it liable, like other partnership assets, to the payment of partnership debts, to the exclusion of the individual debts of the members of the firm, they were clearly guilty of a breach of trust in taking the mortgage. That they were aware of the fact that the mill property was owned and used as partnership property, they are estopped to deny. This is so, because otherwise they would have been innocent purchasers without notice, and no decree could have been properly rendered against them, and in favor of the partnership creditors, in their action to foreclose the mortgage. That decree estops them, not only from denying its truth, but also from denying any fact upon which it necessarily rests. We are bound to assume, therefore, that the executors acted with a knowledge that this was partnership property. It is manifest, however, that they acted in utter ignorance of the law — or rather, the rule of equity — by which such property is subjected, as personal assets, to the payment of partnership debts, to the exclusion of liens created thereon by the individual members of the firm. It is admitted that they acted in good faith, and exercised their best judgment. They followed the advice of their counsel, a lawyer of large practice and long experience, and who stood high in his profession. Would it be just, under such circumstances, to hold

them accountable for their ignorance of this recondite, and I might even say doubtful principle of law — a principle which though established as law in Ohio, is said to be denied in some other States? It never occurred to their counsel to suggest the existence of any such rule of law. How could we expect it would occur to the executors who were unlearned in the law? The evidence shows that the executors consulted many business persons as to the propriety and safety of taking the proposed security, yet no one suggested any difficulty or objection on the ground that the mill was partnership property. In all probability had the testator himself, or the legatees themselves, been consulted, under the same circumstances, they would have fallen into the same mistake. Is it just, then, to hold the executors responsible for this loss? Are they guilty of a breach of trust, a betrayal of the confidence reposed in them by the testator? A majority of the court think not. It seems to us that in taking this last mortgage the executors acted up to the standard observed by men of ordinary prudence and sagacity.

As to the refusal of the executors to release the mill mortgage, and take in lieu thereof the promissory note of a third person, secured by mortgage, it is enough to say that they were not informed of the fact that it was so secured, and that in refusing to accede to the offer they followed the advice of their counsel.

A majority of the court are unable to see any error in the judgment of the Court of Common Pleas.

Judgment affirmed.

McIlvaine, J., dissenting: . . . The facts deducible from the testimony set out in the record of this case are stated (with the exceptions hereinafter mentioned) in the opinion of the court. These facts, in my judgment, show at least two distinct violations of duty on the part of defendants, either of which renders them personally liable to the plaintiffs to account for the lost fund: namely: —

1st. The exchanging of the mortgages first taken — which were undoubted securities for the loans made — for the 'Hepler mortgage,' solely for the accommodation of the borrower, and without the assent of the beneficiaries.

2d. The cancellation of the Hepler mortgage, and acceptance of the 'mill mortgage' as the sole security for the money loaned.

I admit that trustees, in all cases, may, and should, change securities when the interest of the trust estate requires it, or where it is reasonably believed that the change will be beneficial to the estate. But I deny that trustees, in any case (without the assent of the beneficiaries), may change securities for the mere accommodation of the debtor, and without any intent or purpose to benefit the estate. All unnecessary intermeddling with good securities ought to and does impose the risk upon the intermeddler. That such is the rule, where the securities (other than personal securities) come into the hands of the trustees directly from the founder of the trust, is not doubted. And that this rule applies in such cases, even though the declaration of trust contains express authority to change securities, has been frequently held. See Tiffany and Bullard on Trusts, etc., 615, and cases cited.

If express authority, in such cases, to change securities cannot be exercised unless the interest of the trust fund requires it, I can see no reason why good securities taken by trustees upon their own investment should be the subject of a less prudent rule. 'Let well enough alone,' is a maxim of common prudence. Tiffany and Bullard, 615, and cases cited.

In surrendering those good securities first taken, for the mere accommodation of Rogers, the defendants assumed the risk; and inasmuch as the fund has been lost, a liability has been incurred by them to account to the plaintiffs for the lost fund; and this liability has not been, and could not have been wiped out by any subsequent but ineffectual effort on their part to secure the loan in accordance with the directions of the will of Chaplin.

What I claim is this: Where a liability has been incurred by trustees by reason of their fault in giving up good securities for insufficient ones, that liability becomes a security in the hands of the beneficiaries, to which they have a right to look in the event of a loss. And all subsequent efforts on the part of the trustees to obtain 'better or additional security' is to be regarded as efforts made for their own indemnity.

I admit that if the loan had afterwards been called in, the liability would have ceased, for the reason that no loss resulted from the default; but such is not this case, as I understand it. The loan to Rogers never was called in, no new investment was made, or pretended to be made. The first change of securities was made solely for the accommodation of Rogers, because he wanted 'his town property to be clear,' and the second was made for the sole purpose of 'getting better security' for the old note.

Again, in their subsequent efforts to obtain 'better security' the defendants did not stand in the same relation to the fund as in the first instance. They had no choice as between borrowers — that important opportunity for the exercise of discretion was lost — the fund was out. All they could do at that time was to take such 'better security' as they could get. And although the better security offered to them might have appeared good enough, yet who can say it would have been accepted if the money had been in their possession? It is impossible for me to see how trustees, who have violated their duty in making or managing an investment, whereby the foundation of a liability has become fixed, can afterwards, and touching the same investment, be regarded, in equity, with as much favor as though every duty had been faithfully performed.

As to the question whether this investment was lost by reason of the first change in the securities, I have but two remarks to make: 1st. The investment was not at any subsequent time 'well secured' by mortgage on real estate; and 2d. If the defendants had not cancelled those first mort-

gages for the mere accommodation of a 'dashing business man,' these plaintiffs would not have lost their patrimony.

If, however, the defendants cannot be held to account by reason of their first default, because of the subsequent transaction in obtaining the mill mortgage, I still hold that there was no such care and diligence in that transaction as common prudence requires. If that transaction had been a reinvestment of the fund, it ought not to have been made. A man of ordinary prudence, knowing the law (and he is presumed to know it), would not have accepted a mortgage upon a moiety of property held in common, which at the time was in the use of a copartnership composed of the tenants in common, without first inquiring as to the conditions upon which the title was held by members of the firm, and as to the indebtedness of the firm. Had such inquiry been made, the defendants would have come to the knowledge that the common estate was partnership property, and that the debts of the firm were largely in excess of all its assets, and that the mortgage by a copartner in an insolvent firm, upon firm property for his individual debt, was utterly worthless as a security.

It is no answer to this charge of negligence to say that the defendants had the fullest confidence in the pecuniary responsibility of the borrower, and that his reputation in that regard was 'as good as any man in the county.' They were not authorized to look to the pecuniary responsibility of Rogers; the will of Chaplin directed that the loan should be 'well secured by mortgage on real estate.'

Nor will it do to say that this last security was accepted under the advice of counsel, until, at least, it is shown that all the material facts of the case were made known to counsel, which was not so in this case, unless it be inferred from the testimony tending to show that the counsel who gave the advice lived in the neighborhood, knew the property, and was well acquainted with the parties. But I think such inference cannot be fairly drawn from such circumstances, in the face of the testimony of Colonel Nigh (the

counsel referred to, and the only testimony upon this point), who testified as follows: 'All the legal advice I gave them (the executors) was, that the title was in the name of H. C. & R. E. Rogers, jointly; and that there were no liens so far as we could learn from the records.' And on cross-examination Colonel Nigh said, 'I was not called on by Proctor and Anderson, in taking the mill mortgage, to ascertain how much Henry C. Rogers or the firm of H. C. Rogers & Co. was in debt. They did not inquire about whether the partnership debts of H. C. Rogers & Co. would come in ahead of their mortgage. They did not ask my opinion on that.'

In either view of this case the defendants ought to be held to account.

AMSTEIN *v.* GARDNER.

Supreme Court of Massachusetts, January, 1882. 132 Mass. 28.

In case of the escape of a horse while being taken along the highway, and his entering the premises of a railroad company, without fault of the keeper, the owner may recover damages for injury to the animal due to the negligence of the railroad company.

Tort against the manager of the Troy & Greenfield Railroad and Hoosac Tunnel, for injuries occasioned to the plaintiff's horse by falling into the openings between the ties of a bridge in Buckland over which the railroad passed. Trial in the Superior Court, without a jury, before Dewey, J., who reported the case for the determination of this court, in substance as follows:

It was proved or agreed that on March 29, 1880, the plaintiff's horse, while being led along a highway in Buckland, by a competent person in the exercise of ordinary care, escaped and ran along several highways, about fifty rods, and entered upon land of the railroad corporation above named, at a point not fenced nor provided with any

obstruction or barrier to prevent the entrance of cattle upon the railroad; that the horse proceeded along the tracks of the railroad until he came to a bridge over which the tracks were laid, and, entering on the bridge, broke his legs between the ties, and was rendered worthless; and that the keeper of the horse pursued him and used ordinary diligence to recover control of him, but was unable to do so before the horse entered upon the bridge and was injured.

The plaintiff claimed to recover, because the defendant, being responsible for the proper management of the railroad, had neglected to provide a fence, or other obstruction or barrier sufficient to prevent the entrance of cattle on the railroad at the point where the horse entered from the highway.

Upon these facts, the defendant asked the judge to rule that the horse, being unlawfully in the highway when he entered upon the railroad, became a trespasser thereon; and that therefore the defendant was not liable to the plaintiff, either for neglect to maintain the fences, obstructions and barriers required by law, or for any other cause in the premises. The judge so ruled; and ordered judgment for the defendant. If the ruling was erroneous, the judgment was to be set aside and a new trial ordered; otherwise, judgment for the defendant.

Allen, J. — This case is to be distinguished from Darling *v.* Boston & Albany Railroad, 121 Mass. 118. In that case, the horse entered upon the highway by straying from his owner's enclosure in the night, and strayed upon the highway until he entered upon the defendant's railroad. He had no keeper, and there was no attempt to reclaim him. He was at no time making any lawful use of the highway, and was clearly liable to be distrained and impounded as an estray. In the case at bar, the horse was lawfully passing along the highway in the care of a keeper, and casually escaped, without the fault of the keeper, who did not abandon his possession, nor give up the attempt to regain it,

but was in fresh pursuit. We do not think that these facts, with the further fact stated in the exceptions, that the horse ran fifty rods while pursued by his keeper, nor any facts as to actual loss of control of the horse or the improbability of regaining it which can be inferred from them, justify the ruling, as matter of law, that the horse was an estray, unlawfully in the highway. The case is like that of cattle driven on the highway, in which it is settled that the owner of unfenced lands adjoining a highway can have no action on account of cattle which, being properly driven on the highway, casually escape into his land. Cattle properly driven in the highway, and casually escaping there, are not unlawfully in the highway as to such owners. Chief Justice Richardson, in Mills *v.* Stark, 4 N. H. 512, states the rule as follows: 'A man has a right to drive his cattle along the public highways, and if in exercising this right he use ordinary care and diligence and the cattle escape into the adjoining enclosures without his fault, he is not liable for any damage they may do.' In such case the animal lawfully passing on the highway in care of a keeper, and restrained by appropriate means, breaks away from its restraint, and is for the time in the highway without the control of its keeper. If the keeper is not in fault, the act is caused by the nature of the animal, and is incident to the lawful use of the highway, and does not change the character of that use. Whether the character of the use has become changed on any particular occasion, and become unlawful, and the animal an estray, must depend upon the particular facts in the case. Hartford *v.* Brady, 114 Mass. 466, 468, and cases cited; Stackpole *v.* Healy, 16 Mass. 33, and cases cited; Goodwyn *v.* Cheveley, 4 H. & N. 631.

As the court ruled that, upon the facts stated, the horse was unlawfully in the highway, there must be a

New trial.

SWEENY *v.* OLD COLONY RAILROAD COMPANY.

Supreme Court of Massachusetts, January 1865. 10 Allen, 368.

If a railroad company have made a private crossing over their track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness.

Tort to recover damages for a personal injury sustained by being run over by the defendants' cars, while the plaintiff was crossing their railroad by license, on a private way leading from South Street to Federal Street, in Boston.

At the trial in this court, before Chapman, J., it appeared that this private way, which is called Lehigh Street, was made by the South Cove Corporation for their own benefit, and that they own the fee of it; that it is wrought as a way, and buildings are erected on each side of it, belonging to the owners of the way, and there has been much crossing there by the public for several years. The defendants, having rightfully taken the land under their charter, not subject to any right of way, made a convenient plank crossing and kept a flagman at the end of it on South Street, partly to protect their own property, and partly to protect the public. They have never made any objection to such crossing, so far as it did not interfere with their cars and engines. There are several tracks at the crossing. The only right of the public to use the crossing is under the license implied by the fact stated above.

On the day of the accident the defendants had a car at their depot which they had occasion to run over to their car-house. It was attached to an engine and taken over the crossing, and to a proper distance beyond the switch. The

coupling-pin was then taken out, the engine reversed, and it was moved toward the car-house by the side track. The engine was provided with a good engineer and fireman, and the car with a brakeman; the bell was constantly rung, and the defendants were not guilty of any negligence in respect to the management of the car or engine.

As the engine and car were coming from the depot, the plaintiff, with a horse and a wagon loaded with empty beer barrels, was coming down South Street from the same direction. There was evidence tending to show that, as he approached the crossing, the flagman, who was at his post, made a signal to him with his flag to stop, which he did; that, in answer to an inquiry by the plaintiff whether he could then cross, he then made another signal with his flag, indicating that it was safe to cross; that the plaintiff started and attempted to cross, looking straight forwards; that he saw the car coming near him as it went towards the car-house; and that he jumped forward from his wagon, and the car knocked him down and ran over him and broke both his legs. It struck the fore wheel of his wagon, and also his horse. If he had remained in his wagon, or had not jumped forwards, or had kept about the middle of the crossing, the evidence showed that he would not have been injured personally. His wagon was near the left-hand side of the plank crossing as he went.

The defendants contended that even if the plaintiff used ordinary care, and if the flagman carelessly and negligently gave the signal that he might cross, when, in fact, it was unsafe to do so on account of the approaching car, the plaintiff was not entitled to recover, because the license to people to use the crossing was not a license to use it at the risk of the defendants, but to use it as they best could when not forbidden, taking care of their own safety, and going at their own risk; and also that if the flagman made a signal to the plaintiff that he might cross, he exceeded his authority.

But the evidence being very contradictory as to the care

used by the plaintiff, and also as to the care used by the flagman, the judge ruled, for the purpose of taking a verdict upon these two facts, that the defendants had a right to use the crossing as they did on this occasion, and that they were not bound to keep a flagman there; yet, since they did habitually keep one there, they would be responsible to the plaintiff for the injury done to him by the car, provided he used due care, if he was induced to cross by the signal made to him by the flagman, and if that signal was carelessly or negligently made at a time when it was unsafe to cross on account of the movement of the car.

The jury returned a verdict for the plaintiff for $7500; and the case was reserved for the consideration of the whole court.

Bigelow, C. J., for the court. — This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line, which marks the limit of the defendants' liability for damages caused by the acts of their agents, the case at bar falls. But on careful consideration we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incum-

bered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruc-

tion or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best-considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In Corby *v.* Hill, 4 C. B. N. S. 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials

on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials and sustained damage, for which the owner was held liable. Cockburn, C. J., says: 'The proprietors of the soil held out an allurement whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of access thereto.' In Chapman *v.* Rothwell, El., Bl. & El. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap-door to be open without sufficient light or proper safeguards, in a passage-way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage-way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by Keating, J., in Hounsell *v.* Smyth, 7 C. B. N. S. 738. In the last-named case the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger, and not on the owner. The same distinction is stated in Barnes *v.* Ward, 9 C. B. 392; Hardcastle *v.* South Yorkshire Railway, &c., 4 Hurlst. & Norm. 67; and Binks *v.* South Yorkshire Railway, &c., 32 Law Journ. N. S. Q. B. 26. In the last cited case the language of Blackburn, J., is peculiarly applicable to the case at bar. He says, 'There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such.' See also, for a clear state-

ment of the difference between cases where an invitation or allurement is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, Balch *v.* Smith, 7 Hurlst. & Norm. 741, and Scott *v.* London Docks Co., 11 Law Times, N. S. 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot, in any just view of the evidence, be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets of the city (which are much frequented thoroughfares), and was used by great numbers of people who had occasion to pass from one street to the other; and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway; but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was

in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the court, that the defendants induced the plaintiff to cross at the time when he attempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged among other things with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman in fact held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the court; nor do

we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fulness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The court were not requested at the trial to withdraw the case from the jury on the ground that the plaintiff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

Judgment on the verdict.

After the above decision was rendered, the verdict was set aside, by Chapman, J., as against the evidence.

WENDELL *v.* BAXTER.

Supreme Court of Massachusetts, March, 1859. 12 Gray, 494.

The owner of a wharf is bound to reasonable care of the same for those who have a right, by contract or not, to pass over it.

Action of tort against the owners of a wharf in Nantucket, for injuries occasioned to the plaintiff's horse by a defect therein.

At the trial in the Court of Common Pleas at Nantucket, before Bishop, J., it appeared that the wharf was private property, and had for many years been used as wharves generally are by persons having occasion to moor ships or land goods or passengers from vessels or steamboats, paying compensation for wharfage or dockage according to custom or agreement; that part of the wharf was let by the defendants to the Nantucket and Cape Cod Steamboat Company, for the use of their steamboat, which brought the United States mail to Nantucket; and that the plaintiff was employed by them to carry the mail bags in his wagon from the steamboat to the post-office, and was backing his horse and wagon upon that part of the wharf, when the hind feet of the horse broke through the surface of the wharf, and the horse was injured.

The defendants asked the court to instruct the jury 'that the owners of a private wharf were not bound in law to keep it in repair, although they permitted it to be used by the public for the usual purposes of a wharf and for compensation; that if they were under any legal obligation to keep it in repair, such obligation existed only between themselves and the parties with whom they contracted, and to whom they let their wharf; and that the plaintiff, although rightfully upon the wharf, was not there in such way as to make the owners of the wharf liable in law to pay him for injury

received, although such injury might result from a defect therein.'

But the judge declined so to instruct the jury; and instructed them 'that if they were satisfied that the defendants had established the wharf for the use of the public, and invited the public to use it for reasonable compensation, they were bound to keep the wharf safe for the uses for which it was made and erected at that place; that if the plaintiff, being properly on the wharf in the prosecution of his business, and in the exercise of reasonable care and diligence, sustained the injury alleged through a defect in the wharf, he was entitled to recover, unless the defect was latent, and so hidden and concealed that it could not be discovered by such examination and inspection as the construction, uses and exposures of the wharf reasonably required; that if the defendants knew that causes rendering the wharf insecure were constantly or occasionally in operation which they could by the exercise of ordinary diligence and care anticipate and provide against, they were required to do so.' The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

Metcalf, J., for the court. — The court are of opinion that there is no legal ground of exception to the instructions which were given to the jury. The defendants owned a wharf in Nantucket, and let a part of it to a steamboat company that transported the mail. That company employed the plaintiff to take the mail bags from the boat and convey them to the post-office. He therefore was rightfully on the wharf, with his horse and cart, in the prosecution of his business, when his horse was injured. Access over the wharf to the boat, and from the boat over the wharf, for the purpose of lading and unlading the boat, was the undoubted right of all persons who had occasion for such access.

On the foregoing facts, and others which the jury must have found under the instructions which they received, the defendants are answerable to the plaintiff. Mayor & Bur-

gesses of Lyme Regis *v.* Henley, 3 B. & Ad. 92, 93; Pittsburgh City *v.* Grier, 22 Penn. State R. 54. They were legally bound to exercise (at least) ordinary diligence to keep their wharf safe for those who had a right to pass over it; as an innkeeper is bound to keep the access to his inn, and the passages and apartments in it, safe for those who may wish to enter, or who have entered it, legally. The jury have found that the defendants did not exercise such diligence.

It has been argued for the defendants, that if they were legally bound to keep their wharf in repair, they were so bound only in favor of those with whom they, as owners, contracted or dealt, and that they had no contract with the plaintiff. But the plaintiff's right of action arises from the duty which the law imposed on the defendants to keep their wharf safe, so long as they should permit it to be open and used, and not from any contract between them and him. Collett *v.* London & Northwestern Railroad, 16 Ad. & El. N. R. 984, 989.

It has also been argued, that the instructions did not accurately limit the defendants' liability; that the jury were first instructed that the defendants were bound to keep the wharf safe for the uses for which it was made; although it might have been impossible to keep it safe, because the action of the sea might, in one night, have rendered it unsafe, without their knowledge or their power seasonably to apply a remedy. But that instruction was general, and was not intended to state the extent or the limits of the defendants' obligation. Certainly it cannot be understood to mean that the defendants were bound at all events to keep the wharf continually in repair, and that they would be liable for any injury received through want of its safety, however and whenever such want should be caused. And the last part of the instructions limited the defendants' duty and obligation, in this case, to the exercise of ordinary diligence, and also limited their liability to the want of ordinary diligence. Of this limitation the defendants,

surely, have no cause to complain. In the case of Pittsburgh City *v.* Grier, above cited, the court said the owners of the wharf were held to 'the utmost care' of it.

Exceptions overruled.

TOY *v.* UNITED STATES CARTRIDGE COMPANY.

Supreme Court of Massachusetts, March, 1893. 159 Mass. 313.

An employer using machinery cannot by giving the care of the machinery into the hands of one of his competent servants exempt himself from liability to another of his servants injured by reason of a defect in the machinery, due to the negligence of the first servant. Evidence considered sufficient to justify a finding of negligence.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the breaking of a punch in a cartridge machine which she was operating. Trial in the Superior Court, before Hopkins, J., who, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in March, 1893, and afterwards was submitted on the briefs to all the judges.

MORTON, J., for the court. — There is no doubt that there was evidence for the jury on the question of the plaintiff's due care. Indeed, the defendant does not argue that there was not. The real question is whether there was any evidence of negligence on the part of the defendant. It was the duty of the defendant, in the exercise of reasonable care, to see that the machine on which the plaintiff was set to work was in a safe condition, and was suitable for the purpose for which it was used. This obligation applied to all its parts. The punch formed a part of it. Rice *v.* King Philip Mills, 144 Mass. 229. It was fitted to and inserted in it, was necessary to its use, and was furnished by the

defendant for use in it, and as a part of it. A machine may be so constructed, and its operation may be such, as to call for a frequent replacement of one or more of its constituent parts. Such parts when adjusted in the machine become as much a part of it as if included in the original construction, and a defect in one of them is a defect in the machine. The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant. The defendant could not therefore avoid responsibility by delegating this duty to persons whom it believed to be competent, and who were in fact competent to perform it. If the injury to the plaintiff was due to a defect in the punch, which might have been discovered by the exercise of reasonable care on their part, but was not, the defendant is liable for their negligence. Moynihan *v.* Hills Co., 146 Mass. 586, 592, and cases cited.

The plaintiff testified that she was required to examine the cartridge shells from time to time to see if they were scratching; and that on the day of the accident she found that they were scratching, and informed the foreman of it, and he sent for one McParland, the second hand, to look after the machine. McParland took out the dies and punch and put in new dies and a new punch, and then told the plaintiff to start the machine by a signal, which she did. The first time the punch went down through the plate and dies all right, there being no shell; but the second time it broke and caused the injury complained of. The plaintiff further testified that before she started the machine she saw a small black mark extending half-way round the punch about in the middle of the punch; and in further description of it said 'that she did not know what this black mark meant, but that it looked like a knitting needle that had gone rusty and black.' There was also testimony tending to show that the punch broke in the middle, and some of the witnesses said that they never knew before of a punch

breaking in the middle, but that they usually bent or broke at the point. It also appeared that after the accident the broken punch was examined by the foreman and McParland; that the former passed it to one Dimon, who was the defendant's agent and superintendent, and who examined it and passed it back to the foreman, who threw it away; and that the only other person who appeared to have seen it was a woman who worked on a machine near the plaintiff, and who testified that she 'could see that it [the punch] was broken in one place in the middle,' but that 'she did not know what the condition of the broken surfaces was, as the foreman sent her to her work.' We think it would have been competent on this evidence for the jury to find that there was a defect in the punch in the middle, and that the break in the middle was due to it. It is true that the foreman and McParland, who were called as witnesses by the defendant, testified that they saw nothing the matter with the punch, and that Dimon, who was called by the plaintiff, testified that, though he found on examining it with a microscope there was a flaw in it, the flaw did not extend to the outside, and that he did not think it was possible to have discovered the defect which he saw on the inside of the punch, and that, in his judgment, the flaw which he found was not sufficient to have caused the defect. He also testified that bad punches were usually thrown away. But the weight to be given to all this evidence was clearly for the jury. We cannot say that there was no evidence of a defect in the punch, or that, if there was one, there was no evidence that the accident was not caused by it.

It was also a question for the jury, under all the circumstances, whether the failure to discover the defect, if there was one, was due to negligence on the part of the defendant, or of those charged by it with the duty of making and examining the punches. The material from which and the manner in which the punches were made, and the system of inspection adopted by the defendant, were all before the jury, and it was for them to say whether they were all that

reasonable care required, or whether a more careful inspection should have been made, and whether, if it had been made, the defect would have been discovered. There was testimony that, if there was a crack on the outside, it might be filled up in polishing or in turning down the punch. It was for the jury to say also whether the defect, if there was one, was such that failure to discover it afforded evidence of negligence on the part of the person or persons charged with the duty of making or inspecting the punch.

The testimony as to what Dimon said at the former trial was rightly excluded on the ground on which it was evidently offered.[1] Richstain *v.* Washington Mills, 157 Mass. 538.

A majority of the court is of opinion that the entry must be,

Exceptions sustained.

INDERMAUR *v.* DAMES.

Exchequer and Exchequer Chamber, 1866, 1867. L. R. 1 C. P. 274; L. R. 2 C. P. 318.

On the duty of owners of factories to give notice of danger. One who is upon another's premises in the performance of a contract, though as servant of a third person, is not a bare licensee.

Action for damages alleged to be due to negligence. The declaration stated that the defendant was possessed of a high building, containing several floors, used by the defendant as a sugar refinery, in the interior of which was a shaft or shoot, passing from the basement of the building upwards through the several floors thereof, which said shaft or shoot was highly dangerous to persons entering the said building who might be unacquainted with the same, as

[1] Dimon, who was called as a witness by the defendant at the former trial, testified, on cross-examination, that the flaw in the punch might have extended to the outside, and that it might have been discovered.

the defendant then well knew; and that the plaintiff, then being unacquainted with the said premises, was employed by the defendant to enter the said building and execute certain work in his trade of a gas-fitter, after darkness had set in, in the evening, for the defendant, upon one of the upper floors of the said building; yet that the defendant, wrongfully, negligently, and improperly allowed the said shaft or shoot to remain and be open, unfenced, and unguarded and unlighted, whilst the plaintiff was executing the said work, whereby the plaintiff, whilst so employed as aforesaid, fell down the said shaft or shoot, and was precipitated through the same to the basement of the said building, and was greatly hurt, &c.

Pleas, — 1. Not guilty; 2. That there was no such shaft or shoot, as alleged; 3. That the said shaft or shoot was not dangerous, as alleged; 4. That the defendant had no such knowledge of the said danger, as alleged; 5. That the plaintiff was not employed by the defendant, as alleged. Issue thereon. The cause was tried before Erle, C. J., at the sittings in Middlesex after last Michaelmas Term. The facts are as follows: The plaintiff, who was a journeyman gas-fitter, was, at the time of the accident hereinafter mentioned, in the employ of one Duckham, a gas engineer and fitter, who was the patentee of an improved self-acting gas-regulator. The defendant is a sugar-refiner, having extensive premises in Whitechapel. In June, 1864, Duckham, through one Hargreaves, his agent, agreed with the defendant, who was necessarily a large consumer of gas, to fit up on his premises two of his regulators, upon the terms mentioned in the following memorandum: 'I hereby agree to attach two of my patent, self-acting gas-regulators to your meter in area; and, should I fail to effect a saving of from 15 to 30 per cent on your previous consumption, I will remove the regulators, and restore the fittings at my own expense. Should I effect such saving, the machines will be considered, after test, as purchased, and a three-years guarantee given with them. The price to be (two 2-inch), £18.

On Saturday, the 25th of June, Hargreaves went to the defendant's premises, pursuant to appointment, for the purpose of fixing the apparatus. He was accompanied by the plaintiff and another workman in Duckham's employ, named Bristow, and a lad. The plaintiff, however, not being upon that occasion quite sober, Mr. Woods, the defendant's manager, would not allow him to go upon the premises, and the regulators were fixed by Bristow, assisted by the lad, and the work was duly completed. In order to test the regulators, and ascertain that they answered the warranty as to saving in the consumption of gas, it was necessary for the workmen of the patentee to inspect every burner on the premises, to see that they were in a proper state. Bristow having had to do the work almost single-handed, it was too late to make the required inspection on the Saturday night; and accordingly Hargreaves went to the premises on the following Tuesday, accompanied by the plaintiff, in order to examine the several burners, and so test the apparatus. Before going there for that purpose, Hargreaves cautioned the plaintiff, saying: 'Now, mind, Indermaur, sugar-houses are very peculiar places; they neither allow candles or lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man, and you keep close to me.' When they arrived at the premises, Hargreaves and the plaintiff, accompanied by one of the defendant's workmen, with a light, proceeded to the first floor, and, after examining one of the burners, went round to another part of the floor for the purpose of inspecting another. In the mean time, the plaintiff, who had left a pair of plyers at the spot they first went to, turned back to fetch them; but, in returning, instead of going round the way Hargreaves and the defendant's man had gone, he walked straight across towards them, not perceiving an intervening hole in the floor, and fell through to the floor below, a depth of about thirty feet, and fractured his spine.

The hole in question was a shaft or shoot four feet three

inches square, communicating from the basement to the several floors of the building. It was fenced at each side, but open back and front. It was necessary to the defendant's business to have such a shaft; and it was necessary that it should, whilst in use for the raising or lowering of goods, and occasionally also for purposes of ventilation, be open and unfenced; and there was no evidence to show that it was usual in buildings of the kind to adopt the precaution of fencing such shafts.

On the part of the defendant it was submitted that there was no duty or obligation on him to fence the shaft, and consequently no cause of action; and reliance was placed upon Wilkinson *v.* Fairrie, 1 H. & C. 633; 32 L. J. Ex. 73. His lordship observed that, though as to persons employed in the business there might be no duty or obligation to fence, a very different degree of care might be due in the case of a person not so employed, but merely going there for a temporary lawful purpose, as this plaintiff did. He, however, reserved the point.

Several witnesses were then called on the part of the defendant; amongst others, Mr. Woods, the defendant's manager, who stated that the defendant's premises, which had been recently erected, were constructed in the same way as all sugar-refineries were constructed, and were not more than ordinarily dangerous; and that, if he had known that the plaintiff was coming to work upon the premises, he would not have allowed him to do so.

The evidence as to the number of lights on the floor at the time of the accident was conflicting The plaintiff swore that there were only two; the defendant's witnesses that there were five, and that the light was ample. In his summing up, the Lord Chief Justice stated in substance as follows: The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due

and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person (permanently) employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business. And, after observing upon the facts, he told the jury, that, if they found that there was no negligence on the part of the defendant, or that there was want of reasonable care on the part of the defendant, but that there was also want of reasonable care on the part of the plaintiff, which materially contributed to the accident, the plaintiff was not entitled to recover; but that, if there was want of reasonable care in the defendant, and no want of reasonable care in the plaintiff, then the plaintiff was entitled to a verdict.

The jury returned a verdict for the plaintiff, damages £400.

Cur. adv. vult.

Willes, J., for the court.— This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for £400 damages, subject to leave reserved. A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence. The rule was argued during the last term, before Erle, C. J., Keating and Montague Smith, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then, without injury to the business, have been fenced by a rail. Whether it was usual to fence similar shafts when not in use, did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use; and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving; and, for the purpose of ascertaining whether such saving had been effected, the plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident; but the evidence did not establish a peremptory or

absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman; and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (dilectus personæ), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the color of ingratitude, so long as there is no design to injure him. See Hounsell *v.* Smyth, 7 C. B. N. S. 731; 29 L. J. C. P. 203.

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test, whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety seems equally to exist during the accessary employment of testing: and any duty to provide for the safety of the master workman seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable that, in the case of Southcote *v.* Stanley, 1 H. & N. 247; 25 L. J. Ex. 339, upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person

coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of. There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver. Macarthy *v.* Younge, 6 H. & N. 329; 30 L. J. Ex. 227. The case of the carboy of vitriol, Farrant *v.* Barnes, 11 C. B. N. S. 553; 31 L. J. C. P. 237, was one in which this court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but he did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in Seymour *v.* Maddox, 16 Q. B. 326; 20 L. J. Q. B. 327, also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not, however, including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the

defendant, but the servant of the patentee. The question was adverted to, but not decided, in Clarke *v.* Holmes, 7 H. & N. 937; 31 L. J. Ex. 356.

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced and unlighted. Lancaster Canal Company *v.* Parnaby, 11 Ad. & E. 223; 3 P. & D. 162; per cur., Chapman *v.* Rothwell, E. B. & E. 168; 27 L. J. Q. B. 315, where Southcote *v.* Stanley, 1 H. & N. 247; 25 L. J. Ex. 339, was cited, and the Lord Chief Justice, then Erle, J., said: 'The distinction is between the case of a visitor (as the plaintiff was in Southcote *v.* Stanley), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant.' This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessary visit, though it might not be for the shopkeeper's benefit, as during the principal

visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of Wilkinson *v.* Fairrie, 1 H. & C. 633; 32 L. J. Ex. 73, relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case: first, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved that,

when the shaft was not in use, a fence might be resorted to without inconvenience; and no usage could establish that what was in fact necessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it: and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be, that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed; and, as every reservation of leave to enter a nonsuit carries with it an implied condition that the court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved, — in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was there near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by

reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers.

As to the motion to arrest the judgment, for the reasons already given, and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit. The other arguments for the defendants, to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence: but it would be wrong to grant a new trial without a reasonable expectation that another jury might take a different view of the facts; and, as the Lord Chief Justice does not express any dissatisfaction with the verdict, the rule upon this, the only remaining ground, must also be discharged.

Rule discharged.

The case was now carried by appeal to the Exchequer Chamber, where the judgment above pronounced was affirmed. L. R. 2 C. P. 317. The opinion of the court was delivered by

KELLY, C. B., who, after quoting from and adopting the opinion of Willes, J., supra, that the plaintiff was not a licensee, said: The question has been raised whether the plaintiff at the time of the accident, and under the special circumstances of the case, was more than a mere volunteer. Let us see what the case really was. The work had been done on Saturday, and at the conclusion of it an appointment was made for the plaintiff's employer or some other workman to come on the following Tuesday to see if the work was in proper order, and all the parts of it acting rightly. The plaintiff, by his master's directions, went for that purpose, and I own I do not see any distinction between the case of a workman going upon the premises to perform his employer's contract, and that of his going after the contract is completed, but for a purpose incidental to the contract, and so intimately connected with it that few contracts

are completed without a similar act being done. The plaintiff went under circumstances such as those last mentioned, and he comes therefore strictly within the language used by Willes, J., 'a person on lawful business in the course of fulfilling a contract in which both the plaintiff and defendant have an interest.' What, then, is the duty imposed by law on the owner of these premises? They were used for the purpose of a sugar refinery; and it may very likely be true that such premises usually have holes in the floors of the different stories, and that they are left without any fence or safeguard during the day while the workpeople, who it may well be supposed are acquainted with the dangerous character of the premises, are about; but if a person occupying such premises enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him. That view was taken in the judgment below, where it is said, 'With respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact.'

It was so determined in this case; and, though I am far from saying that there was not evidence that the plaintiff largely contributed to the accident by his own negligence, yet that was for the jury; and I think there was clearly some evidence for them that the defendant had not used

reasonable precautions, and that the judge therefore would have been wrong if he had non-suited the plaintiff.

Judgment affirmed.

CROWN *v.* ORR.

Court of Appeals of New York, December, 1893. 140 N. Y. 450.

A servant entering another's service at nineteen years of age takes upon himself the ordinary risks of the service, and all dangers known to him in the service which he undertakes. There is no duty of warning in such a case, in regard to danger obvious to and understood by the servant.

The plaintiff, an infant suing by guardian, sought to recover damages for bodily injuries sustained by him by reason of the defendants' alleged negligence. The plaintiff was at the time engaged in the service of the defendants, and was nineteen years old. Further facts appear in the opinion of the court. Judgment of the General Term, affirming a verdict and judgment for the plaintiff, after refusal of a motion for a new trial.

O'Brien, J., for the court. — The relation of master and servant existed between the plaintiff and the defendants at the time that the former received the personal injury for which he has recovered damages. The question presented is whether, upon any view of the evidence, the result can be attributed to any fault or neglect on the part of the master. The rules of law in such cases are well settled, but it is not always easy to apply them to the varying facts in each particular case. The master does not insure the servant against all accidents and mishaps that may befall him in the business. The servant, when he enters into the relation, assumes not only all the risks incident to such employment, but all dangers which are obvious and apparent. The law imposes upon him the duty of self-protection, and always assumes that this instinct, so deeply rooted in human

nature, will guard him against all risks and dangers incident to the employment or arising in the course of the business of which he has knowledge or the means of knowledge. If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury to him. Thompson on Neg., p. 1008; Haskin *v.* N. Y. C. & H. R. R. R. Co., 65 Barb. 129; affd., 56 N. Y. 608; Jones *v.* Roach, 9 J. & S. 240.

This principle applies to the plaintiff, though he was not at the time of full age. Like any other servant he took upon himself the ordinary risks of the service, and all dangers from the use of machinery which were known to him, or obvious to persons of ordinary intelligence. De Graffe *v.* N. Y. C. & H. R. R. R. Co., 76 N. Y. 125; King *v.* B. & W. R. R. Co., 9 Cush. 112. He is bound to take notice of the ordinary operation of familiar laws, and to govern himself accordingly, and if he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person so using them, and if he neglects to do so he cannot charge the consequences upon the master.

The liability of the master for injuries to the servant received in the service is based upon his personal negligence, and the evidence must establish some personal fault or neglect of duty on his part, or what is equivalent thereto, in order to justify a verdict, and he is entitled to the presumption that he has performed this duty until the contrary is made to appear. Wood on Master & Servant, §§ 345, 346; Cahill *v.* Hilton, 106 N. Y. 517. If the injury to the servant is attributable to the master's neglect in omitting to furnish safe and adequate appliances for the work, according to the nature of the business, or competent co-servants, or even if he neglects to give persons unacquainted with the use of machinery proper instructions with

respect to its use, he is liable. It remains only to apply these principles to the facts of this case as disclosed by the testimony of the plaintiff himself. On the 10th of December, 1890, the plaintiff, who was then about nineteen years of age, and in the employment of the defendants, lost his hand and part of the arm by coming in contact with the knives of a planing machine. No complaint was made that the machine was in any respect defective or unsuitable for the purpose for which it was used, or that the place where the plaintiff was directed to work was in any respect unsafe. The only omission of duty charged against the master in the complaint, or at least the only fault now urged, is that the plaintiff was ignorant of the use of machinery, and the defendants neglected to give proper instructions to him in this regard, or cause them to be given.

When the accident occurred, the plaintiff had been at work in the shop about three weeks. His duty was to stand in front of the machine, and about four or five feet from the end of it, and take off the dressed lumber after it had passed through the planer, and when moved to where he stood by the action of the machine and the use of a small roller and horse attached. He was not required to operate or handle the machine itself, but was cautioned against meddling with its operation. There were four of these machines in the room, under charge of a man who assigned the plaintiff to one of them to take the boards away and load them upon a truck as they were dressed. The plaintiff testifies that on the day of the accident the man in charge ordered him to place a hood made of tin, and used to divert the shavings and dust from the machine to the floor under the frame, in its place in front of the knives of the planer. This hood had a hook at the top, and when in use hung in front of the knives and about eight inches from them, upon a small beam under the frame. He says that while attempting to put it in place his hand was caught by the knives, and in this way the injury was sustained. At this point there is a marked conflict in the evidence. The plain-

tiff says that he was directed by the man in charge to put the hood in place without giving him any instructions as to the manner of doing it, or the danger incident to such an operation. The foreman of the machines in charge admits that he gave him no instructions in this respect, for the simple reason that no such duty was ever required of him, and, in fact, he gave him no order to that effect on this occasion, but the act was entirely voluntary on the part of the plaintiff, and without request or direction from any one. The plaintiff says that when his hand came in contact with the knives, the hood dropped from the hand upon the floor, and that he never succeeded in hanging it. On the other hand, the foreman, and in this he is corroborated by several other witnesses who were working in the shop at the time, says that after the injury the hood was found hanging in front of the knives, not upon the beam where it was always placed, but upon another, some four inches nearer to the knives. Assuming that the verdict has determined conclusively that the foreman ordered the plaintiff to hang this hood in place, in front of the knives of the planer, does this charge the master with personal negligence? The plaintiff had been at work in front of this machine for three weeks, and during that time had full opportunity to observe the manner of handling this hood and placing it upon the machine. He had the same opportunity of informing himself with respect to any danger attending such an act as the master had. There was nothing in the operation which he was required to perform that called for any special instructions, and he asked for none. It was not negligence to direct a young man nineteen years of age, who had seen the machine in operation for three weeks, to perform such duty, even without instructions, especially when he asked for none and gave no sign that he was not entirely familiar with the method by which the order could be properly obeyed. This was one of the risks which he assumed when he entered the defendants' service. But if, as the learned counsel for the plaintiff claims, the operation was specially

dangerous in the absence of instructions, then the danger was obvious, and he was not bound to obey the order; but if he did, the risk was his own. The learned trial judge instructed the jury with respect to the law upon this point in the following language: 'Now, there are some dangers, gentlemen, of which a person does not need to be informed. Where there is a knife or a saw, the danger is palpable to any one who is employed to work, that if he gets before that knife or saw, he will be cut or hurt. . . . Against apparent dangers a master need not warn a servant. . . . Now, here this boy unquestionably knew that there were knives in this machine that planed this board and cut grooves or tongues on either side; that was as plain to his understanding as it is to yours, and it was as clear to him when he was put at this employment as it is to us to-day, after this trial. He knew that if his fingers got within the range of those knives that the same power that caused those knives to revolve and cut off with great rapidity the coating of these boards and make them smooth, would injure his fingers. Instruction was not necessary to impart that information.'

This is a clear exposition of the law applicable to such questions, but we think its application to the proofs in this case called for a non-suit or the direction of a verdict for the defendants. There is no conflict in the evidence as to the particular duties which the plaintiff was hired to perform. They consisted, as already stated, in removing the dressed boards from the machine as they came through, and occasionally sweeping the floor. It is admitted that proper instructions were given him to perform this work with safety, and if it be true, as the plaintiff testifies, that on the occasion in question he was directed to perform another, and specially dangerous service, without sufficient instruction, the fault was not that of the master, but of a co-servant. So that whether we consider the order to hang the hood as an incident of the employment the risks of which the plaintiff assumed, or a direction to do a reckless or dangerous thing without sufficient knowledge or instruction,

the dangers of which were plain and obvious, or a request by the foreman to do something that by the employment he was not bound to do, the result is the same. The plaintiff was, no doubt, very seriously injured, and his case was one which appealed to the sympathy of the jury, although the testimony preponderated strongly in favor of the conclusion that the injury was the result of some carelessness or inattention on his own part. But it would be manifestly unjust to subject the master to damages in such a case where, under the most favorable view that can be taken of the evidence in favor of the plaintiff, the injury was the result of an accident which could not have been anticipated or prevented by the exercise of ordinary care, and which occurred without the fault of the master.

The judgment should, therefore, be reversed, and a new trial granted, costs to abide the event.

All concur. *Judgment reversed.*

CONSOLIDATED COAL COMPANY *v.* HAENNI.

Supreme Court of Illinois, 1893. 146 Ill. 614.

A servant does not impliedly assume the risk of dangers lying outside of those in the course of his particular employment. Whether certain dangers lie outside the servant's employment may be a proper question for the jury.

Whether raising a great iron smoke-stack in a mine is work requiring skill or knowledge is for the jury.

Duty of master and servant respectively in regard to extra hazardous risks, where the servant is inexperienced.

Action for negligence, whereby the plaintiff received bodily injuries. These were sustained in the raising an iron cylinder smoke-stack 35 feet long and weighing 3800 pounds, in the defendant's mine No. 9. The plaintiff was a blacksmith employed in defendant's mine No. 10, of which one Weissenborn was 'pit boss,' one Balke 'top boss,' and one Hansinger 'boss carpenter.' One Hebenstreit

was superintendent of the two mines. The smoke-stack to be raised in mine No. 9 was an eighth of a mile from the plaintiff's blacksmith shop in mine No. 10; and the plaintiff was ordered by Weissenborn to go there and help in the raising, which he did. While the plaintiff, under the orders of Hebenstreit, was pulling upon the steadying-rope, the stack, now in the air, slipped in the rope holding it, became disengaged from its supports, and fell, cutting off the plaintiff's leg in the course of its fall. All the above-named men of the defendant were directing the work at the time. Objection was made by the defendant to certain instructions given to the jury, the nature of which appears in the opinion of the court.

Verdict for the plaintiff, and special findings, that the defendant was negligent in the matter, first by removing the plaintiff from his professional job, and secondly, by improper arrangements for raising the smoke-stack. Judgment accordingly, which was affirmed by the Appellate Court.

Magruder, J., for the court. — Objections are made to the two instructions given to the jury on behalf of the plaintiff. The first instruction lays down, as one of the conditions to a right of recovery, that the jury shall 'believe from the greater weight of the evidence that the plaintiff was employed by the defendant as blacksmith, and that, while so employed, Weissenborn, or some other officer or agent of the defendant, having authority, ordered and directed the plaintiff to assist in hoisting and putting in place a smoke-stack to the furnace connected with the coal mine operated by defendant, and . . . that hoisting and putting in place a smoke-stack was no part of the work which plaintiff had contracted to perform for the defendant.' In regard to this portion of the instruction counsel for appellant says: 'The instruction proceeds upon the supposition that there was evidence tending to show that the work appellee was engaged in was not within the scope of his duty; there

was no such evidence.' The appellant is not in a position to make the objection thus urged, inasmuch as it asked the court to give and the court did give in its behalf an instruction, of which the following is the first paragraph: 'The court instructs the jury that, in order to recover in this case, the plaintiff must have proved by a preponderance of the evidence, not only that it was not within the scope of his employment to be assisting at the work he was engaged in at the time of his injury, but also that some servant of defendant was guilty of some act of negligence which caused plaintiff's injury.' We do not deem it necessary to enter into a discussion of the evidence, if the record were in such shape as to justify us in doing so, in order to determine whether the proof does or does not tend to show that raising the smoke-stack was not within the scope of plaintiff's duties as blacksmith. If plaintiff's instruction is wrong in the respect indicated, the defendant's instruction is chargeable with the same fault. The latter instruction leaves it to the jury to find from the preponderance of the evidence the existence of a fact, which is now claimed to be unsupported by any testimony at all.

The defendant has no right to complain of error in an instruction given for the plaintiff, when like error appears in an instruction given at the defendant's request. Clemson *v.* State Bank of Illinois, 1 Scam. 45; Pierce *v.* Millay, 62 Ill. 133; Northern L. Packet Co. *v.* Binninger, 70 Id. 571; Calumet Iron and Steel Co. *v.* Martin, 115 Id. 358; Ochs *v.* The People, 124 Id. 399; I. C. R. R. Co. *v.* Latimer, 128 Id. 163; L. E. & W. R. R. Co. *v.* Middleton, 142 Id. 550. This doctrine was thus succinctly stated in Ochs *v.* The People, supra, in the following words: 'Surely, it is not for the plaintiffs in error to complain of an instruction when they ask one of the same kind themselves.' Chapman *v.* Barnes, 29 App. Ct. Rep. 184.

The first instruction also predicates plaintiff's right to a recovery upon the belief by the jury 'from the greater weight of the evidence,' 'that hoisting and putting in place

a smoke-stack in the way the smoke-stack in question was being hoisted and put in place, if such was shown from the evidence, was extra-hazardous.' Counsel makes the following objection to this part of the instruction: 'It supposes that there was evidence that the work was extra-hazardous, when there was no evidence except the accident itself.'

When a servant enters into a contract of hiring with the master, he assumes all the risks ordinarily incident to the employment, and is presumed to have contracted with reference to such risks (Wood's Law of Master and Servant, § 326). But where a servant is ordered by the master to do work outside of his regular employment, and which is different in character from that embraced in his regular contract of hiring, and brings him into association with a different class of employees, he does not, by obeying such orders, necessarily thereby assume the risks or hazards incident to the new work. The Pitts., Cin. and St. L. Ry. Co. *v.* Adams, 105 Ind. 151. The hazards incident to the new work may be considered extra-hazardous as being outside of the regular employment, and additional to the risks thereof. As the instructions of both parties left it to the jury to determine whether or not the hoisting of the smoke-stack was outside of plaintiff's duties as a blacksmith, their decision of this question in the affirmative would necessarily involve a finding on their part that the hazards of the additional work were extra.

The evidence tends to show, that the tackle and ropes and blocks were so carelessly and negligently adjusted as to cause the smoke-stack to slip, and the rope to become detached from the hook at the top of the guy-pole. The slipping of the rope from the hook was due either to such careless adjustment, or to the failure to place upon the hook some protection which would keep the rope in its place. In other words, the proof tends to show, that the accident occurred, either because of the carelessness and incompetency of those who arranged the hoisting apparatus and fixed it and placed it in position, or because of defects in

the apparatus itself. Among the risks incident to the business, which the servant is understood to take upon himself by the contract of hiring, are those arising from the careless or wrongful acts of fellow-servants (Wood's Law of Master & Servant § 427). But the assumption by the servant of risks resulting from the negligence of his fellow-servants is subject to the implied undertaking of the master, that he will use all reasonable care to furnish safe premises, machinery and appliances, and to employ competent and prudent co-employees. P. C. & St. L. Ry. Co. *v.* Adams, supra; Wood's Law of Master & Servant §§ 329 and 416. When the master fails to furnish suitable machinery and to see that it is properly protected, or to employ careful and prudent servants to manage and operate such machinery, the risks resulting from such failure are extra-hazardous, and such extra hazards are not among the risks which the employee assumes as a part of his contract of service. U. S. Rolling Stock Co. *v.* Wilder, 116 Ill. 100. Hence, we do not think that the instruction was erroneous in directing the attention of the jury to the question, whether or not the work of hoisting the smoke-stack, by means of the apparatus used for that purpose, was extra-hazardous.

The instruction further predicates the right of recovery upon the belief of the jury from the greater weight of the evidence, that plaintiff was inexperienced, and did not have the requisite skill or knowledge to perform the work of hoisting and putting in place the smoke-stack, and did not see or know the dangers and risks of the work, and, by the exercise of ordinary observation and diligence under all the facts and circumstances surrounding him at the time so far as shown by the evidence, would not have seen or known such dangers and risks; and that his want of knowledge or skill, if shown by the proof, was known to the defendant, or would have been known by the exercise of ordinary diligence; and that the defendant did not give him notice or warning of the danger of hoisting and putting in place the smoke-stack, if such danger is shown by the evidence; and

that Weissenborn (the pit boss of mine No. 10) was superior in authority to plaintiff, and it was the latter's duty to obey the orders and directions of Weissenborn if the evidence shows that such orders were given; and that it was within the scope of Weissenborn's authority to put said smoke-stack in place; and that, while plaintiff was engaged in hoisting, etc., he exercised ordinary care and caution for his own safety, and was injured as alleged in the declaration; and that the injury was caused by the negligence of the defendant, etc., and was the direct result of the authority of Weissenborn over plaintiff. Counsel for appellant objects to this portion of the instruction, because, he says, it assumes that the work done by plaintiff required skill and experience, whereas the plaintiff did nothing but pull, with others, on one of the ropes, and was therefore doing what required no skill or experience; and because of the assumption alleged to be embodied in the instruction, that there was some danger, and that the defendant knew of the danger, and was under obligations to give plaintiff notice of it; and because of the alleged absence on the part of the defendant either in the matter of hoisting the smoke-stack, or in ordering plaintiff to assist in doing so.

The testimony tends to show, that plaintiff was employed by the company to do the work of a blacksmith, and had never before helped to raise a smoke-stack either by means of the apparatus employed by the defendant when the injury occurred, or otherwise. The evidence also tends to show, that plaintiff was called suddenly from his shop to assist in hoisting the stack, and that all the arrangements for effecting such hoisting were completed when he arrived upon the ground, so that he had no opportunity to observe or inspect them.

We are not prepared to say that the raising of an immense iron smoke-stack, weighing 3800 pounds, and placing it in position upon a base prepared for it, is not an operation which requires some experience and 'skill or knowledge.' The instruction properly leaves it to the jury to determine

from the evidence, whether or not the hoisting of the stack in the mode adopted 'required peculiar skill or knowledge to perform it with safety.' While it may be true, that the mere pulling on a rope does not require any skill, yet it may require skill or knowledge to calculate and understand the effect of such exertion upon the apparatus with which the rope is connected, and upon the action of such apparatus in properly lifting the weight attached to it.

The material question, which was and should have been presented to the jury, was, whether the plaintiff, under all the circumstances, had sufficient experience or knowledge to understand the hazards of the extra work which he was required to perform. The instruction cannot be said to assume that there was danger connected with the hoisting, as it uses the qualifying words, 'if any such danger is shown by the evidence.' Where a servant is temporarily engaged in more hazardous work than that for which he was employed, he takes upon himself all such risks incident to the work, as are equally open to the observation of himself and the master. 2 Thompson on Neg., page 976, § 7. It is when the servant works with defective machinery, knowing it to be defective or dangerous, that he assumes the risks incident to its use. 'Not only the defects, but the dangers, must be known to him.' Wood's Law of Master & Servant, §§ 372, 376; Pierce on Railroads, pages 378, 379. As to the master's knowledge, he cannot screen himself from liability upon the ground that he did not know of the defects in his machinery, or of the incompetency of his servants, if he might have known of them by the exercise of due care. Wood's Law of Master & Servant, §§ 330, 347. It has been held, that the master or foreman placed in charge of and conducting a manufacturing business will be presumed to know and be familiar with the dangers, latent and patent, ordinarily accompanying the business. Smith *v.* Peninsular Car Works, 50 Mich. 501. We see no reason why the same presumption of familiarity with latent and patent dangers should not exist, where a master or superin-

tendent is placed in charge of, and authorized to use, such a hoisting apparatus as is described in this record. The law will imply and infer notice of any defect which, by the use of ordinary care, might have been known to the master. Goff *v.* T. St. L. & K. C. R. R. Co., 28 App. Ct. Rep. 529.

As to the master's duty to give notice, the law is that, if there are latent defects or hazards incident to an occupation, of which the master knows or ought to know, and which the servant, from ignorance or inexperience, is not capable of understanding and appreciating, it is the master's duty to warn or inform the servant of them. Smith *v.* Peninsular Car Works, supra; Wood's Law of Master & Servant, § 349; Lalor *v.* C. B. & Q. R. R. Co., 52 Ill. 401; Consolidated Coal Co. *v.* Wombacher, 134 Id. 57.

The question of negligence was submitted to the jury by the first instruction given for the defendant as above quoted, and, therefore, the defendant is estopped from now claiming that there was no proof of negligence. Where the master orders the servant into a service which he did not undertake to perform, and while in such service the servant is injured, the question of negligence must depend upon the facts and circumstances of each case. 14 Am. and Eng. Enc. of Law, page 861. The question whether certain special service outside of the contract can be reasonably required of the servant, depending as it does upon the contract, and the character of the service, and the necessities of the master, must be left to the jury to determine. Wood's Law of Master & Servant, § 89. We do not think that the objections urged should be sustained.

It appears, that at the close of plaintiff's case, the court excluded from the jury certain evidence in regard to putting up the smoke-stack after the occurrence of the injury. Counsel for appellant urges, that the language of the plaintiff's first instruction was broad enough to authorize the jury to consider this excluded evidence. We do not think that the instructions, in requiring the jury to base their findings upon the evidence, can be construed as referring

to any other evidence than that which was not excluded. If such objection in this case can be properly urged against the instructions asked by and given for one party, it can with equal propriety be made to those asked by and given for the other party. Where a jury is required to believe certain facts from the evidence, it has always been understood that the reference is to the evidence which is not ruled out by the court, and which is therefore rightfully in the case.

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Judgment affirmed.

FARWELL *v.* THE BOSTON AND WORCESTER RAILROAD CORPORATION.

Supreme Court of Massachusetts, March, 1849. 4 Met. 49.

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the negligence of a fellow-servant.

In an action of trespass upon the case, the plaintiff alleged in his declaration that he agreed with the defendants to serve them in the employment of an engineer in the management and care of their engines and cars running on their railroad between Boston and Worcester, and entered on said employment, and continued to perform his duties as engineer till October 30, 1837, when the defendants, at Newton, by their servants, so carelessly, negligently, and unskilfully managed and used, and put and placed the iron match rail, called the short switch, across the rail or track of their said railroad, that the engine and cars, upon which the plaintiff was engaged and employed in the discharge of his said duties of engineer, were thrown from the track of said railroad, and the plaintiff, by means thereof, was thrown with great violence upon the ground; by means of

which one of the wheels of one of said cars passed over the right hand of the plaintiff, crushing and destroying the same.

The case was submitted to the court on the following facts agreed by the parties: 'The plaintiff was employed by the defendants, in 1835, as an engineer, and went at first with the merchandise cars, and afterwards with the passenger cars, and so continued till October 30, 1837, at the wages of two dollars per day, that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed.

'On the 30th of October, 1837, the plaintiff, then being in the employment of the defendants, as such engine-man, and running the passenger train, ran his engine off at a switch on the road, which had been left in a wrong condition (as alleged by the plaintiff, and, for the purposes of this trial, admitted by the defendants) by one Whitcomb, another servant of the defendants, who had been long in their employment, as a switchman or tender, and had the care of switches on the road, and was a careful and trustworthy servant, in his general character, and as such servant was well known to the plaintiff; by which running off the plaintiff sustained the injury complained of in his declaration.

'The said Farwell (the plaintiff) and Whitcomb were both appointed by the superintendent of the road, who was in the habit of passing over the same very frequently in the cars, and often rode on the engine.

'If the court shall be of opinion that, as matter of law, the defendants are not liable to the plaintiff, he being a servant of the corporation, and in their employment, for the injury he may have received from the negligence of said Whitcomb, another servant of the corporation, and in their employment, then the plaintiff shall become nonsuit; but if the court shall be of opinion, as matter of law, that the defendants may be liable in this case, then the case shall

be submitted to a jury upon the facts which may be proved in the case; the defendants alleging negligence on the part of the plaintiff.'

Shaw, C. J., for the court. — This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, — that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehavior. 1 Bl. Com. 431; M'Manus *v.* Crickett, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the mas-

ter that the latter shall be answerable civiliter. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim respondeat superior is adopted in that case from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded that the claim could not be placed on the principle indicated by the maxim respondeat superior, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law, — like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy, or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests, — it would be a rule of frequent and familiar

occurrence; and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. Priestley *v.* Fowler, 3 Mees. & Welsb. 1; Murray *v.* South Carolina Railroad Company, 1 McMullan, 385.

The general rule resulting from considerations as well of justice as of policy is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. Copeland *v.* New England Marine Ins. Co., 2 Met. 440–443, and cases there cited. I am aware that the maritime law has its own rules

and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited: a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier; and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590 et seq.

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and, like similar losses from accidental causes, it must rest where it first fell, unless the

plaintiff has a remedy against the person actually in default, of which we give no opinion.

It was strongly pressed in the argument that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but him-

self; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair, and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and, if so, it must be on the ground that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract, and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considera-

tions of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent in case of an incorporated company — are questions on which we give no opinion. In the present case the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred by which the plaintiff sustained a severe loss.

It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is stren-

uously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* ROSS.

Supreme Court of the United States, October, 1884. 112 U. S. 377.

The conductor of a railway train is not to be treated as a fellow-servant with the locomotive engineer of the train.

THE case is stated in the opinion of the court.

MR. JUSTICE FIELD, for the court. — The plaintiff in the court below is a citizen of Minnesota, and by occupation an engineer on a railway train. The defendant in the court below, the plaintiff in error here, is a railway corporation created under the laws of Wisconsin. This action is brought to recover damages for injuries which the plaintiff sustained whilst engineer of a freight train by a collision with a gravel train on the 6th of November, 1880.

Both trains belonged to the company, and for some years he had been employed as such engineer on its roads. On that day he was in charge of the engine of a regular freight train which left Minneapolis at a quarter past one in the morning, its regular schedule time, and had the right of

the road over gravel trains, except when otherwise ordered. At the time of the collision, one McClintock was the conductor of the train, and had the entire charge of running it. It was his duty under the regulations of the company to show to the engineer all orders which he received with respect to the movements of the train. The regulations in this respect were as follows: 'Conductors must in all cases, when running by telegraph and special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station. The conductor will have charge and control of the train, and of all persons employed on it, and is responsible for its movements while on the road, except when his directions conflict with these regulations, or involve any risk, or hazard, in which case the engineer will also be held responsible.'

When the freight train left Minneapolis on the morning of November 6, 1880, there was coming toward that city from Fort Snelling, by order of the company, over the same road, a gravel train, termed in the complaint a wild train, that is, a train not running on schedule time any regular trips. The conductor, McClintock, was informed by telegram from the train despatcher of the coming of this gravel train and ordered to hold the freight train at South Minneapolis until the gravel train arrived. South Minneapolis is between Minneapolis and the place where the collision occurred. The gravel train had been engaged for a week before in hauling in the night gravel to Minneapolis from a pit near Mendota, for the construction by the company of a new and separate line of railroad between St. Paul and Minneapolis, and the freight train had, during this time, been stopped by the conductor, on orders of the train despatcher, upon side tracks between Minneapolis and St. Paul Junction, for the passage of the gravel train. But on the night of November 6, 1880, he neglected to deliver to the plaintiff the order he had received, and after the train started he went into the caboose, and there fell asleep. The

freight train of course did not stop at the station designated, but continuing at a speed of fifteen miles an hour, entered a deep and narrow cut 300 feet in length, through which the road passed at a considerable curve, and on a down grade, when the plaintiff saw on the bank a reflection of the light from the engine of the gravel train, which was approaching from the opposite direction at a speed of five or six miles an hour, and was then within about one hundred feet. He at once whistled for brakes and reversed his engine, but a collision almost immediately followed, destroying the engines, damaging the cars of the two trains, causing the death of one person, and inflicting upon the plaintiff severe and permanent injuries, for which he brings this action.

On the trial the conductor of the gravel train testified that at the time of the collision he was under orders to run to South Minneapolis regardless of the plaintiff's train; that having twelve cars loaded with gravel, his train stalled before reaching the cut where the collision happened; that he then separated his train in the middle, took six cars to Minnehaha Station, went back with the engine for the other six cars, and was coming with them through the cut when the collision occurred; that the gravel train had run in the night about a week, and that when he could reach Minneapolis before the starting time of the plaintiff's train he ran without orders, otherwise upon orders, and had met or passed plaintiff's train at the same place about every night during the week.

It is evident from this brief statement that the conductor on each train was guilty of gross negligence. The conductor of the freight train was not only required by the general duty devolving upon him, as one controlling its movements, to give to its engineer such orders as would enable him to avoid collision with other cars, but as we have seen, he was expressly directed by the regulations of the company, when running by telegraph or special orders, to communicate them to him. Had these regulations been

complied with, the collision would have been avoided. The conductor of the gravel train allowed it to be so overloaded that its engine was incapable of moving it at one portion of the road before reaching the cut; and when, in consequence, he was obliged to leave half of his cars on the track, while he took the others to Minnehaha, he omitted to send forward information of the delay or to put out signals of danger. Having, for the week previous, passed the freight train at nearly the same place on the road, he must have known that by the delay there was danger of collision. Ordinary prudence, therefore, would have dictated the sending forward of information of his position or the putting out of danger signals. Had he done either of these things the collision would not have occurred.

The collision having occurred by the gross negligence of the conductors, the question arises whether the company is responsible to the plaintiff for the injuries which that collision inflicted upon him.

The general liability of a railroad company for injuries, caused by the negligence of its servants, to passengers and others not in its service is conceded. It covers all injuries to which they do not contribute. But where injuries befall a servant in its employ, a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is, that he has, or in law, is supposed to have them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. There is also another reason often assigned for this exemption — that of a supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his mas-

ter. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant.

But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence.

When the service to be rendered requires for its performance the employment of several persons, as in the movement of railway trains, there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases, that he takes upon himself risks arising from the negligence of his fellow-servants, while in the same employment, provided always the master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable. The doctrine was first announced in this country by the Supreme Court of South Carolina, in 1841, in Murray *v.* S. C. Railroad Co. 1 McMullan, 385, and was affirmed by the

Supreme Court of Massachusetts the following year in Farwell *v.* Boston and Worcester Railroad Co., 4 Met. 49. In the South Carolina case a fireman, whilst in the employ of the company, was injured by the negligence of an engineer also in its employ, and it was held that the company was not liable, the court observing that the engineer no more represented the company than the fireman; that each in his separate department represented his principal; that the regular movement of the train of cars to its destination was the result of the ordinary performance by each of his several duties; and that it seemed to be on the part of the several agents a joint undertaking where each one stipulated for the performance of his several part; that they were not liable to the company for the conduct of each other, nor was the company liable to one for the conduct of another, and that as a general rule, when there was no fault in the owner, he was only liable to his servants for wages.

In the Massachusetts case, an engineer employed by a road company to run a train on its road was injured by the negligence of a switch-tender also in its employ, and it was held that the company was not liable. The court placed the exemption of the company, not on the ground of the South Carolina decision, that there was a joint undertaking by the fellow-servants, but on the ground that the contract of the engineer implied that he would take upon himself the risks attending its performance, that those included the injuries which might befall him from the negligence of fellow-servants in the same employment, and that the switch-tender stood in that relation to him. And the court added, that the exemption of the master was supported by considerations of policy. 'Where several persons,' it said, 'are employed in the conduct of one common enterprise or undertaking, and the safety of each depends on the care and skill with which each other shall perform his appropriate duty. Each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will

not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.' And to the argument, which was strongly pressed, that though the rule might apply where two or more servants are employed in the same department of duty, where each one can exert some influence over the conduct of the other, and thus, to some extent, provide for his own security, yet, that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another, it answered that the objection was founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. 'When the object to be accomplished,' it said, 'is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case.' And it added 'that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied.' 4 Met. 59, 60.

The opinion in this case, which was delivered by Chief Justice Shaw, has exerted great influence in controlling the course of decisions in this country. In several States it has

been followed, and the English Courts have cited it with marked commendation.

The doctrine of the master's exemption from liability was first distinctly announced in England in 1850 by the Court of Exchequer in Hutchinson *v.* York, Newcastle and Berwick Railway Co., 5 Exch. R. 343. Priestley *v.* Fowler, 3 M. & W. 1, which was decided in 1837, and is often cited as the first case declaring the doctrine, did not directly involve the question as to the liability of a master to a servant for the negligence of a fellow-servant. In that case a van of the defendant in which the plaintiff was carried was out of repair and overloaded and consequently broke down, and caused the injury complained of; but it did not appear what produced the defect in the van or by whom it was overloaded. The court in giving its decision against the plaintiff observed that if the master was liable, the principle of that liability would 'carry us to an alarming extent;' and in illustration of this statement said that if the owner of a carriage was responsible for its sufficiency to the servant, he was, under the principle, responsible for the negligence of his coach-maker or harness-maker or coachman, and mentioned other instances of such possible responsibility to a servant for the negligence of his fellows, concluding that the inconvenience of such consequences afforded a sufficient argument against the application of the principle to that case. The case, therefore, can only be considered as indirectly asserting the doctrine. At any rate, the Hutchinson case is the first one where the doctrine was applied to railway service. There it appeared that a servant of the company who, in the discharge of his duty, was riding on one of its trains, was injured by a collision with another train of the same company, from which his death ensued; and it was held that his representatives could not recover, as he was a fellow-servant with those who caused the injury; and the court said that whether the death resulted from the mismanagement of the one train or the other, or of both, did not affect the principle. The rule

was applied at the same time by that court to exempt a master builder from liability for the death of a bricklayer in his employ caused by the defective construction of a scaffolding by his other workmen, by reason of which it broke, and the brick-layer at work upon it was thrown to the ground and killed. Wigmore *v.* Jay, 5 Exch. 354.

The doctrine assumes that the servant causing the injury is in the same employment with the servant injured, that is, that both are engaged in a common employment. The question in all cases therefore is, what is essential to render the service in which different persons are engaged a common employment? And this question has caused much conflict of opinion between different courts, and often much vacillation of opinion in the same court.

In Bartonshill Coal Co. *v.* Reid, and the same company *v.* McGuire, reported in 3d Macqueen H. L. Cases, 266, decided in 1858, the parties injured were miners employed to work in a coal-pit, and the party, whose negligence caused the injury, was employed to attend to the engine by which they were let down into the mine and brought out, and the coal was raised which they had dug; and it was held that they were engaged in a common work, that of getting coal from the pit. 'The miners,' said the court in the latter case, 'could not perform their part unless they were lowered to their work, nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth, and of course at the close of their day's labor the workmen must be lifted out of the mine. Every person who engaged in such employment must have been perfectly aware that all this was incident to it and that the service was necessarily accompanied with the danger that the person entrusted with the machinery might be occasionally negligent and fail in his duty.' Lord Chancellor Chelmsford, who gave the principal opinion in the latter case, referred to previous cases in which the master's exemption from liability had been sustained, and said: 'In the consideration of these cases it did not become necessary

to define with any great precision what was meant by the words "common service" or "common employment," and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to ascertain whether the servants are fellow-laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon another, by carelessness or negligence in the course of his peculiar work, is not within the exemption, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him.' The Lord Chancellor commented upon some decisions of the Scotch Courts, and among others that of McNaughton *v.* The Caledonian Railway Co., 19 Court of Sess. Cases, 271, and said that it might be 'sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner or carpenter, who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his death was occasioned, were the engine driver and the persons who arranged the switches.' And in the same case Lord Brougham, after mentioning the observations of a judge of the Scottish courts that an absolute and inflexible rule releasing the master from responsibility in every case where one servant is injured by the fault of another was utterly unknown to the law of England, and added: 'To bring the case within the exemption there must be this most material qualification, that the two servants must be men in the same common employment, and engaged in the same common work under that employment.'

Later decisions in the English courts extend the master's

exemption from liability to cases where the servant injured is working under the direction of a foreman or superintendent, the grade of service of the latter not being deemed to change the relation of the two as fellow-servants. Thus, in Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, decided by the House of Lords, in 1868 on appeal from the Court of Sessions of Scotland, the sub-manager of a coal-pit, whose negligence in erecting a scaffold which obstructed the circulation of air underneath and led to an accumulation of fire-damp that exploded and injured a workman in the mine, was held to be a fellow-servant with the injured party. And the court laid down the rule that the master was not liable to his servant unless there was negligence on the master's part in that which he had contracted with the servant to do, and that the master, if not personally superintending the work, was only bound to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work; that when he had done this he had done all that he was required to do, and if the persons thus selected were guilty of negligence, it was not his negligence, and he was not responsible for the consequences. In this case, as in many others in the English Courts, the foreman, manager or superintendent of the work, by whose negligence the injury was committed, was himself also a workman with the other laborers, although exercising a direction over the work. The reasoning of that case has been applied so as to include, as contended here, employees of a corporation in departments separated from each other; and it must be admitted that the terms 'common employment,' under the late decisions in England, and the decisions in this country following the Massachusetts case, are of very comprehensive import. It is difficult to limit them so as to say that any persons employed by a railway company, whose labors may facilitate the running of its trains, are not fellow-servants, however widely separated may be their labors. See Holden *v.* Fitchburgh Railroad Co., 129 Mass. 268. But notwith-

standing the number and weight of such decisions, there are, in this country, many adjudications of courts of great learning restricting the exemption to cases where the fellow-servants are engaged in the same department, and act under the same immediate direction; and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay down a rule which will determine in all cases, what is to be deemed such an employment, even if it were possible to do so.

There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire con-

trol and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow-servant with the firemen, the brakemen, the porters and the engineer. The latter are fellow-servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation. As observed by Mr. Wharton in his valuable treatise on the Law of Negligence: 'It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true it would relieve corporations from all liability to servants. The true view is, that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation.' § 232 a. The author, in a note, refers to Brickner *v.* New York Central Railroad Co., 2 Lansing, 506, decided in the Supreme Court of New York, and afterwards confirmed in the Court of Appeals, 49 N. Y. 672; and to Malone *v.* Hathaway, 64 N. J. 5, decided in the latter court, in which opinions are expressed in conformity with his views. These opinions are not, it is true, authoritative, for they do not cover the precise points in judgment; but were rather expressed to distinguish the questions thus arising from those then before the court. They indicate, however, a disposition to engraft a limitation upon the general doctrine as to the master's exemption from liability to his servants for the negligence of their fellows, when a corporation is the principal, and acts through superintending agents. Thus, in the first case, the court said: 'A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running cars, to employ and discharge men, and provide all needful

appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporations. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee equally with themselves, represents the corporation as master in all those respects. And though, in the performance of these executive duties, he may be, and is, a servant of the corporation, he is not in those respects a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms, any more than is a director who exercises the same authority.' Page 516.

And in Malone *v.* Hathaway, in the Court of Appeals, Judge Allen says: 'Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect the corporation, within adjudged cases, must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care.' 64 N. Y. 5, 12. See also Corcoran *v.* Holbrook, 59 N. Y. 517.

In Little Miami Railroad Co. *v.* Stevens, 20 Ohio, 415, the Supreme Court of Ohio held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the cars were to

start, and when to stop, it was liable for an injury received by him caused by the negligence of the conductor. There a collision between two trains occurred in consequence of the omission of the conductor to inform the engineer of a change of places in the passing of trains ordered by the company. Exemption from liability was claimed on the ground that the engineer had in consequence, taken by his contract of service, the risk of the negligence of the conductor; and, also, that public policy forbade a recovery in such cases. But the court rejected both positions. To the latter it very pertinently observed, that it was only when the servant had himself been careful that any right of action could accrue to him, and that it was not likely that any would be careless of their lives and persons or property merely because they might have a right of action to recover for injuries received. 'If men are influenced,' said the court, 'by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, the care and prudence of the employer is the surest guarantee against mismanagement of any kind.' In Railway Co. *v.* Keary, 3 Ohio St. 201, the same court affirmed the doctrine thus announced, and decided that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible, holding that the conductor in such case was the sole and immediate representative of the company upon which rested the obligation to manage the train with skill and care. In the course of an elaborate opinion the court said that from the very nature of the contract of service between the company and the employees, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. 'For this pur-

pose,' said the court, 'the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man, and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other.'

In Louisville & Nashville Railroad Co. *v.* Collins, 2 Duvall, 114, the subject was elaborately considered by the Court of Appeals of Kentucky. And it held, that in all those operations which require care, vigilance, and skill, and which are performed through the instrumentality of superintending agents, the invisible corporation, though never actually, is yet always constructively present through its agents who represent it, and whose acts within their representative spheres are its acts; that the rule of English Courts, that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow-servant was not adopted to its full extent in that State, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason. In commenting upon this decision in his Treatise on the Law of Railways, Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts per-

formed by its general agents within the scope of their authority. 'The consequences of mistake or misapprehension upon this point' says the author, 'have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees, and the just responsibility of the company. We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption.' Vol. 1, 554.

There are decisions in the courts of other States, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or lesser extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding — and the present case requires no further decision — that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner. If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism; but its purport touching the liability of the company is, that the conductor and engineer, though both employees, were not fellow-servants in the sense in which that term is used in the decisions; that the former was the representative of the company, standing in its place and stead in the running of the train, and that the latter was, in that particular, his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible.

It was not disputed on the trial that the collision which caused the injury complained of was the result of the negligence of the conductor of the freight train, in failing to show to the engineer the order which he had received to stop the train at South Minneapolis until the gravel train coming on the same road from an opposite direction had passed; and the court charged the jury, that if they so found, and if the plaintiff did not contribute to his injury by his own negligence, the company was liable, holding that the relation of superior and inferior was created by the company, as between the two in the operation of its train; and that they were not, within the reason of the law, fellow-servants engaged in the same common employment.

As this charge was, in our judgment, correct, the plaintiff was entitled to recover upon the conceded negligence of the conductor. The charge on other points is immaterial; whether correct or erroneous, it could not have changed the result; the verdict of the jury could not have been otherwise than for the plaintiff. Without declaring, therefore, whether any error was committed in the charge on other points, it is sufficient to say that we will not reverse the judgment below if an error was committed on the trial which could not have affected the verdict. Brobst *v.* Brock, 10 Wall. 519. And, with respect to the negligence of the conductor of the gravel train, no instruction was given or requested.

Judgment affirmed.

Mr. Justice Bradley, dissenting. — Justices Matthews, Gray, Blatchford and myself dissent from the judgment of the court. We think that the conductor of the railroad train in this case was the fellow-servant of the railroad company with the other employees on the train. We think that to hold otherwise would be to break down the long-established rule with regard to the exemption from responsibility of employers for injuries to their servants by the negligence of their fellow-servants.

O'MALEY *v.* SOUTH BOSTON GAS LIGHT COMPANY.

Supreme Court of Massachusetts, December, 1892. 158 Mass. 135.

It is a defence to an action under the St. of 1887, c. 270, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by reason of the defective condition of the 'ways, works, or machinery' of the defendant, that the plaintiff, when he entered upon the employment, knew and fully appreciated the danger to which he was to be exposed. Vide R.L.O. c. 160 - Cf. s. 6 (3)

Tort, under the St. of 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ. Trial in the Superior Court, before Sherman, J., who, at the defendant's request, directed the jury to return a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If the ruling was correct, the verdict was to stand; otherwise, the verdict was to be set aside and a new trial granted. The material facts appear in the opinion.

Knowlton, J., for the court.— The plaintiff, while wheeling coal in a barrow on a run in one of the defendant's coal sheds, fell off and was injured. The action is brought under the Employers' Liability Act (St. 1887, c. 270), for an alleged defect in the ways, works, or machinery of the defendant, it being contended that the defendant was negligent in not providing guards on the runs to prevent such an accident. The plaintiff testified, and it was undisputed, that he had assisted in the same work at various times during the last fifteen years, and that the coal shed and runs had all the time remained unaltered in construction.

If the action were at common law, it would be too plain for argument that the plaintiff took the risk of such accidents as that which happened, and that the defendant is not liable. Fitzgerald *v.* Connecticut River Paper Co. 155

Mass. 155; Mahoney *v.* Dore, 155 Mass. 513. But it is contended that, under the statute referred to, the rule is different.

It is well settled that, in the absence of a special contract affecting the rights and liabilities of the parties, the statute has taken away from defendants, in the cases mentioned in it, the defence that the injury was caused by the act of a fellow-servant of the plaintiff. It is also established by an adjudication of this court, and by decisions under a similar statute in England, that it has not taken away the defence that the plaintiff, knowing and appreciating the danger, voluntarily assumed the risk of it. Mellor *v.* Merchants' Manuf. Co. 150 Mass. 362; Thomas *v.* Quartermaine, 18 Q. B. D. 685; Yarmouth *v.* France, 19 Q. B. D. 647; Thrussell *v.* Handyside, 20 Q. B. D. 359; Walsh *v.* Whiteley, 21 Q. B. D. 371; Smith *v.* Baker, [1891] A. C. 325. Precisely how and when this defence can be availed of in cases where the ways, works, and machinery of the defendant are found to be defective, has never been decided in this Commonwealth. The nature of the defence was somewhat considered in Fitzgerald *v.* Connecticut River Paper Co. and Mahoney *v.* Dore, ubi supra, which were cases at common law, and it was held that, to be precluded from recovering on this ground, the plaintiff must not only know and appreciate the risk, but must assume it voluntarily. The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, Volenti non fit injuria. One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in

the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty.

That part of the statute under which this action is brought gives a remedy only for defects 'which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition.' A proceeding under it necessarily involves the question whether there was negligence in not having the ways, works, and machinery in better condition. The negligence referred to is the neglect of a duty owed to the plaintiff, and not of a general duty, which, by reason of the relations of the parties, does not extend to him.

The statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. In the numerous enterprises of every kind which involve the employment of labor, there is necessarily almost every degree of danger to employees. Improvements are constantly being made in the methods of doing business, and in the ways, works, and machinery used. The adoption of the latest and best machinery would often involve the displacement and loss of that which has been but little used, and which was the best obtainable when bought. It would be unreasonable to attempt to require every one hiring laborers to have the safest place and the best machinery possible for carrying on his business. It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place and from the kind or quality of the machinery used. Nothing but the

plainest expression of intention on the part of the Legislature would warrant giving the statute such an interpretation. We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery as well since the enactment of this statute as before. If he does so, his employer owes him no duty in respect to such risks, and if he is hurt from a cause included in the contract, the defect is not within the terms of the statute, the maxim, Volenti non fit injuria, applies, and he cannot recover. Whether he knows and appreciates the particulars of the danger is immaterial, if he knows there is danger, and expressly contracts in regard to it without caring to know the particulars, and in such a case he must be deemed to encounter it willingly. One who makes a contract to enter into a new relation undertakes voluntarily what he agrees to do, and his agreement, inasmuch as the other party acts upon it, is to be construed in reference to the obvious facts and circumstances to which it pertains. When he agrees to assume the risk from a certain kind of machinery, his action is equally voluntary in reference to every such risk, whether he fully appreciates the danger or chooses to take the risk of it without knowing its extent; and he absolves his employer from what otherwise would be a duty to make the machinery safer.

The same reason applies equally where the employee, without any express stipulation in regard to risks, enters a service which, by reason of the obvious condition of the ways, works, and machinery, involves peculiar dangers. Such a contract is implied as ought to be implied from the situation and dealings of the parties, and it has the same effect as if expressly made. The work to be done may have special reference to defects in the works or machinery. One may be hired to make repairs which expose him to peculiar dangers by reason of the condition of the defective parts. Surely it cannot be said that a workman does not impliedly contract to take the obvious risks from the condition of the machinery, when he agrees to do work in the

repair of it. Nor can it any more be said that he does not impliedly make a similar contract, when he agrees to work in a business involving obvious dangers by reason of the inferior machinery with which he knows it is to be carried on. He is free to accept the service or not, as he chooses, and, if harm comes to him by reason of his acceptance of it, he suffers voluntarily.

It is manifest that these considerations in reference to a contract, express or implied, do not apply to dangers resulting from conditions which arise or defects which come into existence after the making of the contract, which cannot be deemed to have been contemplated when the contract was made.

The precise question involved in this case does not seem to have been settled in England, although there has been much discussion and a variety of opinion in regard to questions closely allied to it. It is held by all the judges there that the maxim, Volenti non fit injuria, applies as well to actions under the statute as to those at common law; but none of the cases which have come to our attention have determined the effect of a contract to work in a place obviously dangerous by reason of inferior machinery or appointments when the contract was made. Sometimes it seems to have been assumed that the defence of an implied contract to assume the ordinary risks of a business is taken away by the statute, without recognizing any distinction between an implied contract founded on the known condition of the ways, works, and machinery in reference to which the contract is made, and a contract in reference to dangers from the negligence of fellow-servants, or the subsequent neglect of the master. In Walsh *v.* Whiteley, 21 Q. B. D. 371, the decision of the Lords Justices Lindley and Lopes, a majority of the Court of Appeals, tends to support the view we have taken, although the judgment is on different grounds. So also does the judgment in Thomas *v.* Quartermaine, 18 Q. B. D. 685, which has been often considered and explained, but never overruled. In Smith *v.* Baker,

[1891] A. C. 325, elaborate opinions were given in the House of Lords, showing considerable difference of view on some of the questions we have been considering; but the effect of a contract to work under exposure to peculiar dangers from machinery, obvious when the contract was made, was not much considered.

In the present case, the plaintiff when he made his contract knew and fully appreciated the dangers to which he was about to expose himself; for they were obvious, and he had been accustomed to work on the runs, from time to time, for fifteen years, during which period they had remained unchanged. We are of opinion that he impliedly contracted to work on the runs as they were, and that, if they can be considered defective, the defect is not within the description in the St. of 1887, c. 270, § 1, inasmuch as the defendant owed him no duty in regard to it, and he cannot say that its continued existence was owing to the negligence of his employer.

Judgment on the verdict.

POWERS *v.* NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY.

Court of Appeals of New York, March, 1885. 98 N. Y. 274.

A servant who, knowing the existence of a defect in machinery about which he is employed, and fully appreciating the danger arising therefrom, makes use of the defective machinery, assumes the risk.

Action for damages by reason of alleged negligence causing the death of the husband of the plaintiff administratrix. The plaintiffs, of whom there were several suing upon letters of administration, were nonsuited at the trial on the ground that no case was made, and the order of nonsuit was reversed by the General Term, and a new trial granted. Appeal therefrom. The facts appear in the opinion of the court.

Miller, J., for the court. — The intestate was killed by being thrown from a handcar which he and other employees were propelling upon the defendant's road. The complaint alleged that the handcar was unsafe and improperly constructed, and the proof showed that two or three weeks before the accident one of the handles to the walking-beam was broken and that defendant's employees continued to use the car with the handle of a pick or an iron crowbar in the place of the broken handle, it being inserted in the socket by some of them without any direction from the section boss. The crowbar was about five and one-half feet in length, and when used as a handle one end projected four feet and the other one and one-half feet from the socket of the lever. On the day of the accident some of the workmen had inserted the crowbar in the place of the handle that was gone, and observing a train approaching from behind on the same track, instead of removing the handcar to the other track, as was usually done, they started to run it to a distant switch and thus escape the train. They worked the car with all the force they could, using five men on the crowbar instead of three, the usual number. Three of them, including the intestate, were on the long arm, one on the short arm, and one in the centre. The working of the crowbar by the men in the manner in which it was done evidently wrenched the lever or beam by which the car was operated, so that it broke, throwing the intestate under the car and killing him. Prior to the accident the intestate had full knowledge of the defect in the handcar, and voluntarily continued in the employ of defendant without complaining of or objecting to it. By riding on the car and aiding, by the use of the crowbar, in propelling it along on the track, he assumed all risks of injury resulting from the use of the crowbar or from the negligence of his fellow-servants, without any regard whatever to the question whether the defendant knew of the defect or ought to have had knowledge of the same. 2 Thomp. on Neg. 1008 et seq.; Gibson *v.* Erie Railway Co. 63 N. Y. 453; De Forest *v.* Jewett, 88 N. Y. 264.

The deceased was an employee on the road, and no doubt was possessed of the ordinary judgment and sense of those who occupied a similar position. He had sufficient knowledge to understand the ordinary rules which are applicable to the use of a car which was partially disabled, as was the case here. He must have known that the use of the crowbar required the usual care, and would not be as safe and secure as if a proper handle had been in use. He must also have known that the application of extraordinary force, under the circumstances, might perhaps cause the accident by wrenching the walking-beam, as was done by such a use of the crowbar in this case. It did not require a special knowledge or skill to determine that an unusual application of force might result either in the breaking of the handle or the walking-beam. Working on the car as he did, with ample knowledge in regard to its operation, and fully aware of its condition, there would seem to be no ground for claiming that there was any question of fact for the consideration of the jury as to the intestate's knowledge of the risk he incurred in using the car and improperly using the crowbar in propelling the same.

There is a class of cases in the books in which it is held that the question arising as to the knowledge of an injured party in regard to defects in machinery or materials may be submitted to the jury, but these cases are all clearly distinguishable from the one at bar, where it is plainly apparent that knowledge must have existed as to the character of the implements or machinery employed and of the risks incident thereto, and that the injured party acted with an entire appreciation of the actual condition of the car on which he was riding, fully realized the state in which it was, and did not deem it essential to make any complaint, or give any notice to the defendant that he considered it unsafe or unfit for use. In the case of East Tennessee &c. R. Co. *v.* Smith, 9 Lea (Tenn.), 685, the accident occurred by reason of the breaking of a handle on a handcar under circumstances similar to those presented in the case at bar, and

the question discussed was as to the defect in one of the wooden handles of the lever which was claimed to be too small for the purpose, and it was held by the court that the determination of such a matter required no special knowledge or scientific skill, and if with such knowledge the plaintiff elected to continue in the service he should be regarded as voluntarily electing himself to take the risk.

This rule may be invoked with far greater reason in the case considered, where the simple question was, whether the car could be properly used in the manner it was after substituting the crowbar in the place of the handle.

We are referred to the remarks in the opinion in the case of Laning *v.* New York Cent. R. Co. 49 N. Y. 521, to the effect that if the servant remains in the service after a defect arises and complains of the same, it is for the jury to say whether or not he voluntarily assumed the risk of defective machinery whereof he has full and equal knowledge. The alleged defect in that case was the employment of unfit men, of which the person had knowledge and made complaint; and while the rule stated may well apply to such a case, it cannot be regarded as pertinent to one where it is clear and unmistakable that the employee not only had knowledge but a full appreciation of the character of the instrumentalities with which he was working, and made no complaint.

It is true that regard must be had to the limited knowledge of the employee as to the machinery and structure on which he is employed, and to his capacity and intelligence, and that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise; Connolly *v.* Poillon, 41 Barb. 366; but this rule should not be invoked where it is entirely apparent that the servant has an intelligent and clear comprehension of the nature of the risks to which he is subjected. Some other cases are cited by the respondents' counsel, but they are all distinguishable from the case at bar, and none of them hold that where the evidence

clearly shows that the person injured had full knowledge of the defect and intelligently and completely appreciated its true character, there was any question of fact for the consideration of the jury.

It is apparent, we think, under the facts presented that the intestate, with full knowledge of the defects in the car, assumed the responsibility of working on the same and the risks arising therefrom, and that no liability was incurred by the defendant by reason of the accident which caused his death. There is far stronger reason here for relieving the defendant from liability, where the defect did not exist originally, and when the servant upon discovering it failed to perform his duty in notifying the master, than under ordinary circumstances. By his neglect of duty in this respect he was chargeable with contributory negligence, which prevents his recovery of damages on account of being injured by reason of the use of the defective handcar.[1]

We are also of the opinion that the action cannot be maintained for the additional reason that the deceased was chargeable with contributory negligence in the use of the handcar by himself and his fellow-servants in the manner in which it was propelled at the time of the accident. It was clearly negligence to seek to avoid the train in the manner they did. The deceased participated with his fellow-servants in this act and was responsible for the consequences which followed.

There was no question of fact for the jury upon the trial; and for the reasons stated the motion for a nonsuit was properly granted, and the General Term erred in reversing the judgment. The order of the General Term should be reversed and judgment entered on the order nonsuiting plaintiff at circuit.

Order reversed.

[1] This appears to be but a remark by the way, and perhaps was not as fully considered as if the case had turned upon it.

SUTTON *v.* WAUWATOSA.

Supreme Court of Wisconsin, June, 1871. 29 Wis. 21.

The fact that plaintiff was driving his cattle to market on Sunday, in violation of statute, when they were injured by the breaking down of a defective bridge which the defendant town was bound to maintain, will not prevent a recovery for the damage sustained by him.

Appeal from County Court for Milwaukee County. Action against the town of Wauwatosa to recover damages for injuries to plaintiff's cattle, caused by the breaking down of a defective bridge which they were crossing.

The plaintiff started from Columbus on a Friday morning with a drove of about fifty cattle, intending to take them to Milwaukee, and sell them. Stopping at Hartland over Saturday night, he resumed his journey on Sunday morning, and at about four o'clock, P. M., reached a public bridge of about seventy-two feet span, over the Menomonee River, in the town of Wauwatosa. The cattle were driven upon the bridge; and, when the greater part of them were near the middle of the span, the stringers broke, some twelve feet from the abutments at each end, and precipitated the structure, with the cattle upon it, into the river, causing the death of some, severely injuring others, and rendering the remainder, for a time, unsalable.

The complaint alleges, that the injury was caused by the dangerous, unsafe, and rotten condition of the bridge, and the neglect of the defendant to keep it in proper repair.

The answer denies the negligence charged to the defendant and alleges that the cattle were driven upon the bridge in so careless and negligent a manner as to cause it to break, and also that they were so driven upon the bridge on Sunday.

After hearing the evidence on the part of the plaintiff, the court granted a nonsuit, on the ground that the plain-

tiff, being in the act of violating the statute prohibiting the doing of secular business on Sunday, when the injury occurred, could not recover therefor. The plaintiff appealed.

Dixon, C. J., for the court. — It is very clear that the plaintiff, in driving his cattle along the road and over the bridge, to a market, on Sunday, was at the time of the accident in the act of violating the provisions of the statute of this State, which prohibits, under a penalty not exceeding two dollars for each offence, the doing of any manner of labor, business, or work on that day, except only works of necessity or charity. R. S. c. 183, § 5. It was upon this ground the nonsuit was directed by the court below; and the point thus presented, that the unlawful act of the plaintiff was negligence, or a fault on his part contributing to the injury, and which will preclude a recovery against the town, is not a new one; nor is the law, as the court below held it to be, without some adjudications directly in its favor, and those by a judicial tribunal as eminent and much respected for its learning and ability as any in this country. Bosworth *v.* Swansey, 10 Met. 363; Jones *v.* Andover, 10 Allen, 18. A similar if not the very same principle has been maintained in other decisions of the same tribunal. Gregg *v.* Wyman, 4 Cush. 322; May *v.* Foster, 1 Allen, 408. But in others still, as we shall hereafter have occasion to observe, the same learned court has, as it appears to us, held to a different and contradictory rule in a class of cases which it would seem ought obviously to be governed by the same principle. The two first above cases were in all material respects like the present, and it was held there could be no recovery against the towns. In the first, the opinion, delivered by Chief Justice Shaw, and which is very short, commences with a statement of the propositions, repeatedly decided by that court, 'that to maintain the action it must appear that the accident was occasioned exclusively by the defect of the highway; to establish which, it must appear that the plaintiff himself is free from

all just imputation of negligence or fault.' The authorities to this proposition are cited, and the statute against the pursuit of secular business and travel on the Lord's day then referred to; and the opinion proceeds: 'The act of the plaintiff, therefore, in doing which the accident occurred, was plainly unlawful, unless he could bring himself within the excepted cases; and this would be a species of fault on his part, which would bring him within the principle of the cases cited. It would show that his own unlawful act concurred in causing the damage complained of.' This is all of the opinion touching the point under consideration.

In the next case there was a little, and but a little, more effort at reasoning upon the point. The illustrations on page 20, of negligence in a railway company in omitting to ring the bell of the engine, or to sound the whistle at the crossing of a highway, and of the traveller on the wrong side of the road with his vehicle at the time of the collision, and the language of the court alluding to such 'conduct of the party as contributing to the accident or injury which forms the groundwork of the action,' very clearly indicates the true ground upon which the doctrine of contributory negligence, or want of due care in the plaintiff, rests; but it is not shown how or why the mere violation of a statute by the plaintiff constitutes such ground. Upon this point the court only say: 'It is true that no direct unlawful act of omission or commission by the plaintiff, done at the moment when the accident occurred, and tending immediately to produce it, is offered to be shown in evidence. But it is also true that, if the plaintiff had not been engaged in the doing of an unlawful act, the accident would not have happened, and the negligence of the defendants in omitting to keep the road in proper repair would not have contributed to produce an injury to the plaintiff. It is the disregard of the requirements of the statute by the plaintiff, which constitutes the fault or want of due care, which is fatal to the action.' It would seem from this language that the violation of the statute by the plaintiff is regarded only as a

species of remote negligence, or want of proper care on his part, contributing to the injury.

The two other cases above cited were actions of tort by the owners, to recover damages from the bailees for injuries to personal property loaned and used on Sunday, — horses loaned and immoderately driven on that day. They were decided against the plaintiffs, and chiefly on the ground of the unlawfulness of the act of loaning or letting on Sunday of the horses, to be driven on that day in violation of the statute, which the plaintiffs themselves were obliged to show, and the doctrine of par delictum was applied. It was in substance held in each case that the plaintiff, by the first wrong committed by him, had placed himself in pari delicto with the defendant, with respect to the subsequent and distinct wrong committed by the latter; and the actions were dismissed upon the principle that the law will not permit a party to prove his own illegal acts in order to establish his case.

In direct opposition to the above decisions are the numerous cases decided by the courts of other States, and the courts of Great Britain, which have been so diligently collected and ably and forcibly presented in the brief of the learned counsel for the present plaintiff. Of the cases thus cited, with some others, we make particular note of the following: Woodman *v.* Hubbard, 5 Foster, 67; Mohney *v.* Cook, 26 Penn. 342; Norris *v.* Litchfield, 35 N. H. 271; Corey *v.* Bath, ib. 530; Merritt *v.* Earle, 29 N. Y. 115; Bigelow *v.* Reed, 51 Maine, 325; Hamilton *v.* Goding, 55 ib. 428; Baker *v.* The City of Portland, 58 ib. 199; Kerwhacker *v.* Railway Co., 3 Ohio St. 172; Phila., &c. Railway Co. *v.* Phila., &c. Tow-boat Co., 23 How. (U. S.) 209; Bird *v.* Holbrook, 4 Bing. 628; Barnes *v.* Ward, 9 M., G. & S. 420.

It seems quite unnecessary, if indeed it were possible, to add anything to the force or conclusiveness of the reasons assigned in some of these cases in support of the views taken and decisions made by the courts.

The cases may be summed up, and the result stated generally to be the affirmance of two very just and plain principles of law as applicable to civil actions of this nature; namely, first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with or leading to or causing or producing the wrongful act complained of; and, secondly, that the fault, want of due care, or negligence on the part of the plaintiff, which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. Under the operation of the first principle, the defendant cannot exonerate himself or claim immunity from the consequences of his own tortious act, voluntarily or negligently done to the injury of the plaintiff, on the ground that the plaintiff has been guilty of some other and independent wrong or violation of law. Wrongs or offences cannot be set off against each other in this way. 'But we should work a confusion of relations, and lend a very doubtful assistance to morality,' say the court in Mohney *v.* Cook, 'if we should allow one offender against the law to the injury of another to set off against the plaintiff that he too is a public offender.' Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the State, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this; and it seems contrary to the dictates of both that such a defence should be allowed to prevail. It would extend the maxim, ex turpe causa non oritur actio, beyond the scope of its legitimate application, and violate the maxim equally binding and wholesome, and

more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong, and to visit unmerited and over rigorous punishment upon the plaintiff, constitute the sole motive for such defence on the part of the person making it. In the cases of the horses let to be driven on Sunday, so far as the owners were obliged to resort to an action on the contract which was executory and illegal, of course there could be no recovery; but to an action of tort, founded not on the contract, but on the tort or wrong subsequently committed by the defendant, the illegality of the contract furnished no defence, as is clearly demonstrated in Woodman *v.* Hubbard, and the cases there cited. The decisions under the provision of the constitution of this State abolishing imprisonment for debt arising out of or founded on a contract, express or implied, and some others in this court, strongly illustrate the same distinction. In re Mowry, 12 Wis. 52, 56, 57; Cotton *v.* Sharpstein, 14 Wis. 229, 230; Schennert *v.* Koehler, 23 Wis. 523, 527.

And as to the other principle that the act or conduct of the plaintiff, which can be imputed to him as a fault, want of due care, or negligence on his part contributing to the injury, must have some connection with the injury as cause to effect, this also seems almost too clear to require thought or elaboration. To make good the defence on this ground, it must appear that a relation existed between the act or violation of law on the part of the plaintiff and the injury or accident of which he complained; and that relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another. It must have been some act, omission, or fault naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances. It is obvious that a violation of the Sunday law is not of itself an act, omission, or

fault of this kind, with reference to a defect in the highway or in a bridge over which a traveller may be passing, unlawfully though it may be. The fact that the traveller may be violating this law of the State has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day; and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned. In this respect it would be wholly immaterial also that the traveller was within the exceptions of the statute, and travelling on an errand of necessity or charity, and so was lawfully upon the highway.

The mere matter of time when an injury like this takes place is not in general an element which does or can enter at all into the consideration of the cause of it. Time and place are circumstances necessary in order that any event may happen or transpire; but they are not ordinarily, if they ever are, circumstances of cause in transactions of this nature. There may be concurrence or connection of time and place between two or three or more events, and yet one event not have the remotest influence in causing or producing either of the others. A traveller on the highway, contrary to the provisions of the statute, yet peaceably and quietly pursuing his course, might be assaulted and robbed by a highwayman. It would be difficult in such case to perceive how the highwayman could connect the unlawful act of the traveller with his assault and robbery so as to justify or excuse them, or how it could be said that the former had any natural or legitimate tendency to cause or produce the latter. It is true, it might be said if the traveller had not been present at that particular time or place, he would not have been assaulted and robbed, but that too might be said of any other assault or robbery committed upon him; for if

his presence at one time and place be a fault or wrong on his part, contributing to the assault and robbery in the nature of cause to effect, it must be equally so at every other time and place, and so always a defence in the mouth of a highwayman. Every highwayman must have his opportunity by the passing of some traveller; and so some one must pass over a rotten and unsafe bridge or defective highway before any accident or injury can happen from that cause. Connection, therefore, merely in point of time, between the unlawful act or fault of the plaintiff and the wrong or omission of the defendant, the same being in other respects disconnected, and independent acts or events, does not suffice to establish contributory negligence or to defeat the plaintiff's action on that ground. As observed in Mohney *v.* Cook, such connection, if looked upon as in any sense a cause, whether sacred and mysterious or otherwise, clearly falls under the rule causa proxima non remota spectatur.

'The cause of an event,' says Appleton, C. J., in Moulton *v.* Sanford, 51 Maine, 134, 'is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily that condition is usually termed the cause, whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event.' In the present case the weight of the same cattle, upon the same bridge, either the day before or the day after the event complained of, when the plaintiff would have been guilty of no violation of law in driving them, would most unquestionably have produced the same injurious result. And if, on that day even, the driving had been a work of necessity or charity, as if the city of Milwaukee had been in great part destroyed by fire, as Chicago recently was, and great numbers of her inhabitants in a condition of helplessness and starvation, and the plaintiff hurrying up his drove of beef

cattle for their relief, no one doubts the same accident would then have happened, and the same injuries have ensued. The law of gravitation would not then have been suspended, nor would the rotten and defective stringers have refused to give way under the superincumbent weight, precisely as they did do on the present occasion. There are many other violations of law which the traveller or other person passing along the highway may, at the time he receives an injury from a defect in it, be in the act of committing, and which are quite as closely connected with the injury, or the cause of it, as is the violation of which complaint is made against the present plaintiff. He may be engaged in cruelly beating or torturing his horse, or ox, or other animal; he may be in the pursuit of game, with intent to kill or destroy it, at a season of the year when this is prohibited; he may be exposing game for sale, or have it in his possession, when these are unlawful; he may be in the act of committing an assault or resisting an officer; he may be fraudulently passing a toll-gate, without paying his toll; and he may be unlawfully setting or using a net or seine, for the purpose of catching fish, in an inland lake or stream. All of these are acts prohibited by the same chapter or statute in which we find the prohibition from work and labor on Sunday, and some of them under the same, but most under a greater penalty than is prescribed for that offence, thus showing the character or degree of culpability which was variously attached to them in the opinion of the legislature. And there are many other minor offences, mala prohibita merely, created by statute, which might be in like manner committed. There are in Massachusetts, and doubtless in many of the States, statutes against blasphemy and profane cursing and swearing, the prevention of which seems to be equally if not more an object of solicitude and care on the part of the legislature than the prevention of labor, travel, or other secular pursuits on Sunday, because more severely punished. It has not yet transpired, we believe, even in Massachusetts, that the action of any per-

son to recover damages for an injury sustained by reason of defects in a highway has been peremptorily dismissed because he was engaged at the time in profane cursing or swearing, or because he was in a state of voluntary intoxication, likewise prohibited under penalty by statute.

It is obvious that the breaking down of a bridge from the rottenness of the timbers, or their inability to sustain the weight of the person or of his horses and carriage, could not be effected by either of these circumstances; and yet, on the principle of the decisions above referred to in that State, it is not easy to see why the action must not be dismissed. On principle there could be no discrimination between the cases, and it could make no difference in what the unlawful act of the plaintiff consisted at the time of receiving the injury. We must reject the doctrine of those cases entirely, and adopt that of the other cases cited, and which is well expressed by the Supreme Court of Maine, in Baker *v.* Portland, 59 Maine, 199, 204, as follows: 'The defendant's counsel contends that the simple fact that the plaintiff is in the act of violating the law at the time of the injury is a bar to the right of recovery. Undoubtedly there are many cases where the contemporaneous violation of the law by the plaintiff is so connected with his claim for damages as to preclude his recovery; but to lay down such a rule as the counsel claims, and disregard the distinction in the ruling of which he complains, would be productive oftentimes of palpable injustice. The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half the road, or that he was travelling on runners without bells, in contravention of the statute, or that he was smoking a cigar in the street, in violation of municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travellers, if the commission of the plaintiff's offence did not in any degree contribute to produce the injury of which he complains.'

Strong analogy is afforded, and much weight and force of reason bearing upon this question are found, in some of the cases which have arisen upon life policies, and as to the meaning and effect to be given to the condition usually contained in them, exempting the company from liability in case the assured 'shall die in the known violation of any law,' &c., and it has been held that the violation must be such as is calculated to endanger life, by leading to acts of violence against, or to the bodily or personal injury or exposure of, the assured, and so to operate in producing his death in the connection of cause to effect. See opinions in Bradley *v.* Mutual Benefit Life Ins. Co., 44 N. Y.

In the case of Clemens *v.* Clemens, recently decided by this court, it became necessary to consider the same question, though under different circumstances, as to what violation of law on the part of the plaintiff would bar his action in a court of justice, and leave him remediless in the hands of an over-reaching and dishonest antagonist; and the views there expressed are not without their relevancy and adaptation to the question as here presented. In that case, this court adopted the rule of law as settled in Massachusetts, favoring the remedy of the plaintiff, against the opposite rule sustained by the adjudications in some of the other States; and consistency of decision seems now clearly to require that our action should be reserved with respect to the rule established by the cases here referred to. The inconsistency upon general principle between these decisions of the same learned court and those there relied upon and adopted, will, we think, be readily perceived and conceded when carefully examined and considered in connection with each other.

The other question presented on the motion for a nonsuit, and which the court below did not decide, but which has been argued here, is one of more doubt and difficulty to our minds. It is whether the plaintiff was guilty of contributory negligence in permitting so many cattle to go upon the bridge at one time. To sustain the nonsuit on this ground, it is necessary for us to look at the facts in the most favor-

able light possible for the plaintiff, in which the jury would have been at liberty to find them, and then to say that there was no evidence which would have justified a verdict in his favor, or such a clear and decided preponderance of evidence against him as would have required the court to set aside a verdict finding to the contrary. This court is not sufficiently familiar with the modes of constructing and using bridges upon country highways, the degree of strength required to render them ordinarily and reasonably safe and passable, the weight which they are expected or required to sustain, the care necessary in passing over them, and especially with herds of cattle or other animals, to say, with confidence in the correctness of its own judgment, upon the evidence before it, that the plaintiff was guilty of such negligence. The evidence given throws little or no light upon these points, necessary to the formation of a correct judgment; and they are matters upon the evidence, when in, more properly to be considered by the jury, unless the evidence should be such, within the rule above stated, as to make it the duty of the court to withdraw them from the consideration of the jury, and itself to determine the legal rights of the parties upon the truth of the facts thus assumed to be indisputably shown.

By the court. *Judgment reversed, and a venire de novo awarded.*

NEWCOMB *v.* BOSTON PROTECTIVE DEPARTMENT.

Supreme Court of Massachusetts, January, 1888. 146 Mass. 596.

The fact that a person is injured while violating a city ordinance, through another's negligence, will not defeat his right to recover, unless his unlawful act was a contributing cause of the injury; in which case it is a bar to recovery, and not merely evidence which might or might not bar recovery.

The St. of 1874, c. 61, § 3, in giving the Boston Protective Department the "right of way while going to a fire," does not relieve it from liability for an injury, caused by its negligence, to a person who is in the exercise of due care, and whose unlawful act does not contribute to the injury.

Tort for personal injuries occasioned to the plaintiff, a cab-driver, by a collision between the cab and a wagon of the defendant.

At the trial in the Superior Court, before Blodgett, J., evidence was introduced tending to show that the defendant was incorporated under the St. of 1874, c. 61,[1] for the protection of life and property at fires in the city of Boston, and that the collision occurred while one of its wagons, with its regular complement of men, was responding to a fire alarm; that the wagon was proceeding along Washington Street in a northerly direction; that the cab, upon which the plaintiff was sitting, was one of several cabs standing in a line upon the easterly side of Washington Street between the easterly track of a street railway and the curbstone; that the plaintiff's cab and horse were not drawn up lengthwise of the street and as near as possible to the curbstone, but that the horse was facing the sidewalk at an angle so that the body of the cab projected eighteen or twenty inches into the street beyond the line of the other cabs; and that the wagon of the defendant was driven negligently into the cab, causing the accident.

The defendant asked the judge to instruct the jury as follows:

'1. If the plaintiff, at the time of the accident, was violating the ordinance of the city of Boston, to wit, "Every owner, driver, or other person having the care and ordering of a vehicle shall, when stopping in a street, place his vehicle and the horse or horses connected therewith

[1] Section 3 of this statute is as follows: — 'The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston, subject to such rules and regulations as the city council and the fire commissioners may prescribe, and subject also to the rights of the Boston Fire Department; and any violation of the street rights of the Boston Protective Department shall be punished in the same manner as is provided for the punishment of violations of the rights of the Boston Fire Department in chapter three hundred and seventy-four of the Acts of eighteen hundred and seventy-three.'

lengthwise with the street, as near as possible to the sidewalk," that was an unlawful act, and he cannot recover in this action. 2. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action. 3. Under section 3, chapter 61, of the Acts of 1874, "The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston," said defendant is not liable for an accident caused by the collision of one of its teams, while going to a fire, with a vehicle standing in the streets, in violation of either of the city ordinances. 4. If the plaintiff, at the time of the action, was violating the ordinance of the city of Boston, to wit, "Every driver of a vehicle shall remain near it while it is unemployed or standing in a street, unless he is necessarily absent in the course of his duty and business, and he shall so keep his horse or horses and vehicle as not to obstruct the streets," that was an unlawful act, and he cannot recover in this action. 5. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action.'

The judge refused to give these instructions, but instructed the jury as to the effect of a violation of the ordinance as to the position of a vehicle and horse while standing in a street, stating that the rule was applicable to both ordinances, as follows:

'Bearing in mind the provision of the regulation as to the position of a vehicle when not in motion, I instruct you as to the law, that if, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that

contributed to the injury. Whether the position of the plaintiff's horse and carriage, in violation of an ordinance, did or did not contribute to the injury, is a question of fact for the jury; and in determining this question, the jury will take into consideration all the surrounding facts and circumstances. . . . The plaintiff must prove that his position was not so carelessly taken as to contribute to the collision; and the fact that his position was in violation of the ordinance is not conclusive proof of negligence which contributed to the injury. Or, stating the general rule in a somewhat different form, the fact that the plaintiff is engaged in violating the law does not prevent him from recovering damages of the defendant for an injury which the defendant could have avoided by the exercise of ordinary care, unless the unlawful act contributed proximately to produce the injury. . . . If, applying these rules, you are of the opinion that there was no negligence, in other words, no carelessness, on the part of the plaintiff, which directly contributed to the injury, then the plaintiff is entitled to maintain this action, if he proves another proposition; and as to that, the burden is upon him. And that proposition is, that the defendant's servants, in the care and management of this wagon, at the time the plaintiff was injured, were negligent.'

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

Knowlton, J., for the court. — The plaintiff brought his action to recover for injuries received while sitting upon his cab, from the negligent driving of a wagon against it by a servant of the defendant corporation. There was evidence tending to show that, at the time of the accident, he was violating an ordinance of the city of Boston, by waiting in a street without placing his vehicle and horse lengthwise with the street, as near as possible to the sidewalk, and that this illegal conduct contributed to the injury. There was evidence applicable in like manner to another

similar ordinance, which requires every driver of a vehicle standing in a street so to keep his horse or horses and vehicle as not to obstruct the streets.

As to the alleged violation of each of these ordinances, the defendant asked the court to instruct the jury as follows: 'If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action.' The presiding judge declined to give this instruction, and gave none which we deem to be equivalent to it. He instructed the jury in these words: 'If, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that contributed to the injury.' In another part of the charge it was indirectly intimated that, if the plaintiff's unlawful act contributed proximately to produce the injury, he could not recover, but it was nowhere expressly stated.

The question before us then is, whether or not the defendant was entitled to this instruction,— in other words, whether, if the plaintiff's unlawful act contributed to cause his injury, it was a bar to his recovery, or merely evidence of negligence which might or might not bar him, according to the view which the jury should take of his conduct as a whole, in its relation to the accident.

It has often been held that a violation of law at the time of an accident, by one connected with it, is evidence of his negligence, but not conclusive. Hanlon *v.* South Boston Horse Railroad, 129 Mass. 310. Hall *v.* Ripley, 119 Mass. 135. Damon *v.* Scituate, 119 Mass. 66. In recent times a large number of penal statutes have been enacted, in which the legislature has seen fit to punish acts which are not mala in se, and sometimes when in a given case there is no actual criminal intent. On grounds of public policy, laws

have been passed under which a person is bound to know the facts in regard to the subject with which he is dealing, when under possible circumstances ignorance would not be inconsistent with proper care. One who sells milk must know that it is not adulterated. An unlicensed person must know that what he sells is not intoxicating liquor. Commonwealth *v.* Boynton, 2 Allen, 160. And if in a possible case he trespasses in innocent ignorance, the law gives him no relief. He can only appeal to the sense of justice and the discretion of the public authorities to save him from the punishment which the law would inflict. It is obvious that in suits for negligence, if the contributing conduct of the plaintiff is to be considered as a whole, it may sometimes be found that he has not been guilty of actual negligence or fault, although he has violated the law. One element of his action may be neglect of a duty prescribed by a statute, when there are other concurring elements which show that his course was entirely justifiable.

As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, illegal conduct of a plaintiff directly contributing to the occurrence on which his action is founded, is an exception to this rule. Such illegality may be viewed in either of two aspects: looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect it wears a hostile garb, and an inquiry is at once suggested, whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hand of the law. In the first view, the illegal conduct comes within the general rule just stated; in the second, it does not. This distinction has not always been observed. A plaintiff's

violation of law has usually been discussed in connection with the subject of due care.

In Bosworth *v.* Swansey, 10 Met. 363, Chief Justice Shaw, after referring to the rule that a plaintiff must be free from 'imputation of negligence or fault,' says, in reference to unlawful travelling on the Lord's day, 'This would be a species of fault on his part, which would bring him within the principle of the cases cited.'

In Jones *v.* Andover, 10 Allen, 18, Chief Justice Bigelow says, 'The term "due care," as usually understood in cases where the gist of the action is the negligence of the defendant, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject-matter or transaction which constitutes the cause of action.'

In Steele *v.* Burkhardt, 104 Mass. 59, an action for negligence in driving against the plaintiffs' horse, which was left standing in a street in violation of an ordinance, Chief Justice Chapman considers the general subject of the plaintiffs' due care, and then treats particularly the contention of the defendant that the plaintiffs were compelled to prove their violation of law in order to establish their case.

McGrath *v.* Merwin, 112 Mass. 467, was an action founded on the defendant's alleged negligence in starting the machinery of a mill, while the plaintiff was at work in the wheel-pit making repairs on the Lord's day, and Mr. Justice Morton, in delivering the opinion, deals with the case solely upon the principle that courts will not aid a plaintiff whose action is founded upon his own illegal act, and says, 'The decisions in this Commonwealth are numerous and uniform to the effect that the plaintiff, being engaged in a violation of law, cannot recover, if his own illegal act was an essential element of his case as disclosed upon all the evidence.' He further states the rule in such cases to be, that, 'if the illegal act of the plaintiff contributed to his injury, he cannot recover; but though the plaintiff at the time of the injury was acting in violation of

law, if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovering.'

In Davis *v.* Guarnieri, 45 Ohio St. 470, Owen, C. J., states, as the second of three considerations upon which the doctrine of contributory negligence is founded, 'the principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong.'

No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary. Hall *v.* Ripley, 119 Mass. 135; Banks *v.* Highland Street Railway, 136 Mass. 485; Tuttle *v.* Lawrence, 119 Mass. 276, 278; Lyons *v.* Desotelle, 124 Mass. 387; Heland *v.* Lowell, 3 Allen, 407; Steele *v.* Burkhardt, 104 Mass. 59; Damon *v.* Scituate, 119 Mass. 66; Marble *v.* Ross, 124 Mass. 44; Smith *v.* Boston & Maine Railroad, 120 Mass. 490. And it is quite immaterial whether or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering, on the ground that the court will not lend its aid to one whose violation of law is the foundation of his claim. Hall *v.* Corcoran, 107 Mass. 251.

While this principle is universally recognized, there is great practical difficulty in applying it. The best minds often differ upon the question whether, in a given case, illegal conduct of a plaintiff was a direct and proximate cause contributing with others to his injury, or was a mere condition of it; or, to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential element of his case as disclosed upon all the evidence. Upon this point it is not easy to reconcile the cases. It has been unanimously

decided that in Gregg *v.* Wyman, 4 Cush. 322, there was error in holding a plaintiff's illegal conduct to be an essential element of his case, when in fact it was merely incidental to it. Hall *v.* Corcoran, ubi supra. But whatever criticisms may have been made upon the decisions or the assumptions in certain cases, that illegal action of a plaintiff contributed to the result, or was to be treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition, there has been none upon the doctrine that, when a plaintiff's illegal conduct does directly contribute to his injury, it is fatal to his recovery of damages. Baker *v.* Portland, 58 Maine, 199; Norris *v.* Litchfield, 35 N. H. 271; Sutton *v.* Wauwatosa, 29 Wis. 21.

The plaintiff relies with great confidence upon the case of Hanlon *v.* South Boston Horse Railroad, 129 Mass. 310, in which the presiding judge at the trial refused to rule, that, 'if the defendant was driving at a rate of speed prohibited by the ordinance of the city of Boston, and this speed contributed to the injury, this fact would itself constitute negligence on the part of the defendant, and would entitle the plaintiff to recover if he was in the exercise of due care,' and his refusal was held right by this court. In giving the opinion, after pointing out that driving at a rate of speed forbidden by the ordinance might have occurred without fault of the driver, and might have been justified by circumstances authorizing the jury to find that there was no negligence, Mr. Justice Colt said, 'It is not true that, if an unlawful rate of speed contributed to the injury, that alone would give the plaintiff a right to recover, if he was without fault.' There are intimations, without adjudication, to the same effect, in Wright *v.* Malden & Melrose Railroad, 4 Allen, 283, and in Lane *v.* Atlantic Works, 111 Mass. 136. See also Kirby *v.* Boylston Market Association, 14 Gray, 249; Heeney *v.* Sprague, 11 R. I. 456; Brown *v.* Buffalo & State Line Railroad, 22 N. Y. 191; Flynn *v.* Canton Co., 40 Md. 312.

But there is nothing in the language used in Hanlon *v.* South Boston Horse Railroad inconsistent with the principle which we have already stated. That decision related to the liability of a defendant. It may be, where a penal statute does not purport to create a civil liability, or to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection with all the attendant circumstances, appears to be negligent or wrongful. And at the same time courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor.

The instruction requested in the case at bar would have become applicable only upon a finding by the jury that the plaintiff's unlawful act contributed to cause the injury. The jury may have so found; and we are of opinion that upon such a finding, irrespective of the question whether viewed in all its aspects his act was negligent or not, the court could not properly permit him to recover. The instruction, therefore, should have been given.

The court rightly refused the instruction requested, that the plaintiff could not recover if at the time of the accident he was violating the ordinance, and so doing an unlawful act. This request ignored the distinction between illegality which is a cause, and illegality which is a condition of a transaction relied on by a plaintiff, or between that which is an essential element of his case when all the facts appear, and that which is no part of it, but only an attendant circumstance. The position of a vehicle, which has been struck by another, may or may not have been one of the causes of the striking. Of course it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately produces, or helps to produce, a result as an efficient cause, and that which is a

necessary condition or attendant circumstance of it. If the position of the plaintiff's vehicle was such as, in connection with ordinary and usual concurring causes, would naturally produce such an accident, that indicates that it contributed to it. But, even in that case, external causes may have been so exclusive in their operation, and so free from any relation to the position of the vehicle, as to have left that a mere condition, without agency in producing the result. What is a contributing cause of an accident is usually a question for a jury, to be determined by the facts of the particular case; and such it has been held to be in many cases like the one before us. Damon *v.* Scituate, 119 Mass. 66; Hall *v.* Ripley, 119 Mass. 135; Welch *v.* Wesson, 6 Gray, 505; Spofford *v.* Harlow, 3 Allen, 176; White *v.* Lang, 128 Mass. 598; Baker *v.* Portland, 58 Maine, 199; Norris *v.* Litchfield, 35 N. H. 271; Sutton *v.* Wauwatosa, 29 Wis. 21.

The defendant's third request for an instruction was rightly refused, for reasons which have already been stated. The statute referred to does not relieve the defendant from liability for negligence to a plaintiff whose unlawful act or want of due care does not contribute to his injury. In the opinion of a majority of the court the entry must be

Exceptions sustained.

THOMAS *v.* WINCHESTER.

Court of Appeals of New York, July, 1852. 6 N. Y. 397.

The buyer at retail of a drug labelled dandelion, which he uses as such, whereas it is belladonna, may maintain an action for negligence against a manufacturer and wholesale dealer who put up and so labelled the drug.

THE case is stated in the opinion of the court.

RUGGLES, C. J., for the court.— This is an action brought to recover damages from the defendant for negligently put-

ting up, labelling, and selling as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff, Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, &c.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison County, where the plaintiffs reside.

A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was belladonna, and not dandelion. The jar from which it was taken was labelled '½ lb. dandelion, prepared by A. Gilbert, No. 108 John Street, N. Y. Jar, 8 oz.' It was sold for and believed by Dr. Foord to be the extract of dandelion as labelled. Dr. Foord purchased the article as the extract of dandelion from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John Street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts

purchased by him from others were labelled alike. Both were labelled, like the jar in question, as 'prepared by A. Gilbert.' Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labelled in Gilbert's name because he had previously been engaged in the same business on his own account at No. 108 John Street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell, and taste, but may, on careful examination, be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester, and used in his business with his knowledge and assent.

The defendant's counsel moved for a nonsuit on the following grounds: —

1. That the action could not be sustained, as the defendant was the remote vendor of the article in question, and there was no connection, transaction, or privity between him and the plaintiffs, or either of them.

2. That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord.

3. That the plaintiffs were liable to and chargeable with the negligence of Aspinwall and Foord, and therefore could not maintain this action.

4. That, according to the testimony, Foord was chargeable with negligence, and that the plaintiffs therefore could not sustain this suit against the defendant; if they could sustain a suit at all, it would be against Foord only.

5. That this suit, being brought for the benefit of the wife, and alleging her as the meritorious cause of action, cannot be sustained.

6. That there was not sufficient evidence of negligence in the defendant to go to the jury.

The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge, among other things, charged the jury that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending as and for dandelion the extract taken by Mrs. Thomas, or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant, and sold by him to Aspinwall, and by Aspinwall to Foord; that if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment, or expense to the husband; and that the recovery should be confined to the actual damages suffered by the wife.

The action was properly brought in the name of the husband and wife for the personal injury and suffering of the wife, and the case was left to the jury with the proper directions on that point (1 Chitty on Pleadings, 62, ed. of 1828).

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If, in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A build a wagon and sell it to B, who sells it to C, and C hires it to D, who, in consequence of the gross negligence of A in building the

wagon, is overturned and injured, D cannot recover damages against A, the builder. A's obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of Winterbottom *v.* Wright, 10 Mees. & Welsb. 109, was decided. A contracted with the postmaster-general to provide a coach to convey the mail-bags along a certain line of road, and B and others also contracted to horse the coach along the same line. B and his co-contractors hired C, who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C could not maintain an action against A for the injury thus sustained. The reason of the decision is best stated by Baron Rolfe. A's duty to keep the coach in good condition was a duty to the postmaster-general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was

his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.

Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labelled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. 2 R. S. 662, § 19. A chemist who negligently sells laudanum in a phial labelled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter. Terrymond's Case, 1 Lewin's Crown Cases, 169. 'So highly does the law value human life, that it admits of no justification wherever life has been lost and the carelessness or negligence of one person has contributed to the death of another.' Regina *v.* Swindall, 2 Car. & Kir. 232, 233. And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. 2 Car. & Kir. 368, 371. Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer, but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? or that the

exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labelled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabelled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart, who leaves them unattended in the street, is liable for any damage which may result from his negligence. Lynch *v.* Nurdin, 1 Ad. & Ellis, N. S. 29; Illidge *v.* Goodwin, 5 Car. & Payne, 190. The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. 5 Maule & Sel. 198.[1] The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle, if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label.

In Longmeid *v.* Holliday, 6 L. & Eq. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

[1] Ante, p. 435.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion, and to have been 'prepared' by his agent, Gilbert. The word 'prepared' on the label must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label, would have been an open question in an action by the plaintiffs against him; and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defence, that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion, and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge, in submitting to the jury the question in relation to the negligence of Foord and Aspinwall, cannot be complained of by the defendant.

GARDINER, J., concurred in affirming the judgment, on the ground that selling the belladonna without a label indicating that it was poison, was declared a misdemeanor by statute (2 R. S. 694, § 23), but expressed no opinion upon

the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

Judgment affirmed.

MILLS *v.* ARMSTRONG.

THE BERNINA.

House of Lords, 1888. 13 A. C. 1.

Contributory negligence in the navigators of a ship is not contributory negligence in the passengers. Thorogood *v.* Bryan, in the doctrine of identification of passenger with carrier, overruled.

Appeal from a decision of the Court of Appeal, reported as the Bernina, 12 P. D. 58.

The facts appeared in a special case stated for the opinion of the court in three actions in personam brought in the Admiralty Division against the owners of the steamship Bernina, who were the appellants in this appeal.

In September, 1884, a collision occurred between the Bernina and the steamship Bushire, the result of which was that J. H. Armstrong, first engineer of the Bushire, T. T. Owen, second officer of the Bushire, and M. A. Toeg, a passenger on board the Bushire, were drowned. The collision was caused by the fault or default of the master and crew of the Bushire. Armstrong and Toeg had nothing to do with the negligent navigation of the Bushire, but Owen was in charge of her at the time and was directly responsible for it. The three actions were brought by the personal representatives of Armstrong, Owen, and Toeg respectively, to recover damages for their respective deaths.

The questions for the opinion of the court were (1) whether the defendants were liable for the damages sustained in each case, and (2) if liable, whether they were liable to pay the whole of such damages or only a moiety in each case. Butt, J., on the authority of Thorogood *v.* Bryan, 8 C. B. 115, pronounced that the defendants were not liable in any of

the actions. 11 P. D. 31. The Court of Appeal reversed this decision so far as it concerned the actions by the representatives of Armstrong and Toeg, and pronounced that the defendants were liable in those two actions for the damages proceeded for, and referred the amount to the registrar; being of opinion that Thorogood *v.* Bryan was wrongly decided; that the actions were not admiralty actions; and therefore that the admiralty rule as to half damages did not apply to them. 12 P. D. 58, 83, 84, 95.

Before the Court of Appeal the claim on behalf of Owen's representatives was given up, and the respondents in the appeal to this House consisted only of the representatives of Armstrong and Toeg respectively. The question upon the admiralty rule as to half damages was mentioned by the appellant's counsel but was not argued before this House.

Lord Herschell. — My lords, this appeal arises upon a special case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's Act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives, and who, it is alleged, lost their lives through the negligence of the appellants.

The appellants are the owners of the steamship Bernina, between which vessel and the steamship Bushire a collision took place, which led to the loss of fifteen persons who were on board the latter vessel. It is admitted that the collision was caused by the fault or default of the master and crew of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of the Bushire, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board the Bushire.

The question arises whether, under these circumstances, the appellants are liable. The appellants having, as they admit, been guilty of negligence from which the respondents

have suffered loss, a prima facie case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor again do they allege that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts, as e. g. the relation of master and servant or employer and agent acting within the scope of his authority. But they rest their defence solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence without which the disaster would not have occurred. In support of the proposition that this establishes a defence they rely upon the case of Thorogood *v.* Bryan, 8 C. B. 115, which undoubtedly does support their contention.

This case was decided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism, it has never come for revision before a court of appeal until the present occasion. That action was one brought under Lord Campbell's Act, against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the kerb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. The learned judge directed the jury that 'if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases — notwithstanding the defendant, by her servant, had been guilty of negligence — their verdict must be for the defendant.' The jury gave a verdict for

the defendant, and the question was then raised, on a rule for a new trial on the ground of misdirection, whether the ruling of the learned judge was right. The court held that it was.

It is necessary to examine carefully the reasoning by which this result was arrived at. Coltman, J., said: 'It appears to me that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he was travelling that want of care of the driver will be a defence of the driver of the carriage which directly caused the injury.' Maule and Vaughan Williams, JJ., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself: 'I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased.' Vaughan Williams, J., said, 'I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by.'

With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger

from recovering against the driver's master; though if 'negligence of the owner's servants is to be considered negligence of the passenger,' or if he 'must be considered a party' to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. To say that it is a defence because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defence the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another.

I pass now to the other reasons given for the judgment in Thorogood *v.* Bryan. Maule, J., says: 'On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. . . . But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust.'

I confess I cannot concur in this reasoning. I do not think it well founded either in fact or in law. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring.

The only other reason given is contained in the judgment of Cresswell, J., in these words: 'If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position.' Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third persons. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in Thorogood *v.* Bryan was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory.

I will not detain your lordships further on this part of the case beyond saying that I concur with the judgments of the learned judges in the court below, and specially with the very exhaustive judgment of the Master of the Rolls.

It was suggested in the course of the argument that

Thorogood *v.* Bryan might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be that, as a pleading point, this would have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defence on the merits if the facts had been properly averred. If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle when sued could maintain as a defence, 'I am not guilty, because but for the negligence of another person the accident would not have happened.' And I do not see how this defence is any more available as against a person being carried in one of the vehicles, unless the reasoning in Thorogood *v.* Bryan be well founded.

I have said that the decision in Thorogood *v.* Bryan has not been unquestioned. I do not think it necessary to enter upon a minute consideration of the subsequent cases, after the careful and accurate examination to which they have been subjected by the Master of the Rolls. The result may be summarized thus: The learned editors of Smith's Leading Cases,[1] Willes and Keating, JJ., strongly questioned the propriety of the decision. Parke, B., whose dictum in Bridge *v.* Grand Junction Ry. Co., 3 M. & W. 244, Williams, J., followed in directing the jury in Thorogood *v.* Bryan, appears to have doubted the soundness of the judgment in that case. Dr. Lushington, in The Milan, Lush. 388, expressed strong disapproval of it; and though in Armstrong *v.* Lancashire & Yorkshire Ry. Co., L. R. 10 Ex. 47, it was followed, and Bramwell and Pollock, BB., to say the least did not indicate dissatisfaction with it, I understand that my noble and learned friend Lord Bramwell, after hearing this case argued, and maturely considering it, agrees with the judgment of the court below. In Scotland

[1] In notes to Ashby *v.* White.

the decision in Thorogood *v.* Bryan was pronounced unsatisfactory, in Adams *v.* Glasgow & Southwestern Ry. Co., 3 Ct. Sess. Cas. 4th Ser. 215. In America it has been followed in the courts of some States, but it has often been departed from, and upon the whole the view taken has been decidedly adverse to it. The latest case that I am aware of in that country is Little *v.* Hackett, 116 U. S. 366. That was a decision of the Supreme Court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect. Field, J., in delivering judgment examined all the English and American cases, and the conclusion adopted was the same as that at which your lordships have arrived.

I have only this observation to add. The case of Waite *v.* Northeastern Ry. Co., E., B. & E. 719, was much relied on in the argument for the appellants; but the very learned counsel who argued that case for the defendants, and all the judges who took part in the decision, were of opinion that it was clearly distinguishable from Thorogood *v.* Bryan, and did not involve a review of that case. I think they were right.

As regards the other questions raised, I have only to say that I think they were properly dealt with by the court below.

I am requested by my noble and learned friend Lord Bramwell, who was unable to remain to read the opinion which he had prepared, to state that he concurs in the motion which I am about to make.[1]

Lord Watson. — My Lords, the appellants conceded in argument that unless it can be shown that Thorogood *v.*

[1] Lord Bramwell, in his opinion, treated the question in Thorogood *v.* Bryan as turning upon the pleading, and in that aspect as right. The special plea in regard to the defendant's negligence had not, said his lordship, been proved. The plea alleged defendant's negligence alone; the proof showed, not joint negligence by two persons, but two separate acts of negligence.

Bryan is a valid precedent, they cannot succeed in this appeal. Although nearly forty years have elapsed since that case was decided, I think the rule which it established must still be dealt with upon its own merits. The decision has not met with general acceptance, and it cannot be represented as an authority upon which a course of practice has followed, or upon which persons guilty or intending to be guilty of contributory negligence are entitled to rely.

When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he cannot recover compensation from the others for the obvious reason that but for his own neglect he would have sustained no harm. Upon the same principle individuals who are injured, without being personally negligent, are nevertheless disabled from recovering damages if at the time they stood in such a relation to any one of the actual wrongdoers as to imply their responsibility for his act or default. That constructive fault which implies the liability of those to whom it is imputable to make reparation to an innocent sufferer, must also have the effect of barring all claims at their instance against others who are in pari delicto, is a proposition at once intelligible and reasonable. If they are within the incidence of the maxim 'qui facit per alium facit per se,' there can be no reason why it should apply in questions between them and the outside public and not in questions between them and their fellow wrondgoers. But the facts which were before the court in Thorogood *v.* Bryan do not appear to me to bring the case within that principle.

My noble and learned friend Lord Bramwell, who is so conversant with the intricacies of English pleading, suggested in the course of the argument a technical ground upon which the decision in Thorogood *v.* Bryan might be justified. In that view the case would not be an authority for the appellants, who accordingly supported the ratio assigned for the judgment, which was simply this, that the deceased passenger, by taking his seat on the omnibus,

became so far identified with its driver that the negligence of the driver was imputable to him in any question with the driver or owner of the other omnibus, which ran over him and was the immediate cause of his death. Coltman and Cresswell, JJ., express themselves in terms which, if literally understood, would lead to the conclusion that he would also have been responsible for damage solely attributable to the fault of the driver. Coltman, J., said: 'Having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it.' Maule, J., was careful to limit his observations to the case before him. 'I incline to think,' said the learned judge, 'that *for this purpose*' — i. e. recovering damages from the defendant — 'the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased.'

I do not think the very eminent judges who decided Thorogood *v.* Bryan intended to affirm that the deceased by taking his seat in the omnibus incurred the same responsibility for the negligent acts of the driver as if the latter had been his servant. If they did mean to do so, their conclusion might be perfectly logical, but their premises would be directly at variance with the principles laid down in Quarman *v.* Burnett, 6 M. & W. 499, which I have always regarded, and still regard, as a sound and authoritative precedent. If they did not, then they have affirmed that a passenger travelling by a public conveyance may be so unconnected with the driver as to be exempt from liability for his negligence and yet be so identified with him as to lose all right of action against wrongdoers whose negligence, in combination with that of the driver, has occasioned personal injury to himself. That is a proposition which it is very difficult to understand. It must be a singular kind of relationship, and created by very excep-

tional circumstances, which results in the superior being affected by his inferior's negligence in a question with wrongdoers and not in a question with persons who are themselves free from blame.

It humbly appears to me that the identification upon which the decision in Thorogood *v.* Bryan is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle except perhaps the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am therefore unable to assent to the principle upon which the case of Thorogood *v.* Bryan rests. In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence in the one case of the driver, and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions and thereby occasions mischief. In that case he must of course be responsible for the consequences of his interference.

Counsel for the appellants endeavored to support Thorogood *v.* Bryan upon a totally different principle from that assigned by the learned judges who decided the case. They argued alternatively that the maxim 'respondeat superior' does not apply; and that passengers are affected by the wrongful acts of the driver, not because he is in any sense their servant, or subject to their control, but by reason of their being for the time under his dominion. Waite *v.* Northeastern Ry. Co., E., B. & E. 719, was the authority

relied on in support of this branch of the argument. But there is no analogy between the position of an infant incapable of taking care of itself and that of a passenger sui juris; and the theory that an adult passenger places himself under the guardianship of the driver so as to be affected by his negligence appears to me to be absolutely without foundation in fact or law.

I therefore concur in the judgment which has been moved.

Lord Macnaghten. — My Lords, I concur in the motion which has been proposed, and in the reasons upon which it has been founded.

Order appealed from affirmed, &c.

NORTH PENNSYLVANIA RAILROAD COMPANY *v.* MAHONEY.

Supreme Court of Pennsylvania, February, 1868. 57 Penn. St. 187.

Negligence of a stranger in attempting to protect a child of tender years from danger is not the negligence of the child.

Action against a railroad company for negligence resulting in bodily injury to the plaintiff, a girl of four years suing by next friend. The child's aunt, a Mrs. Farr, not being guardian or care-taker or having other authority over the child, undertook to carry the plaintiff across the defendant's track before an approaching train, from a place of danger to a place of safety, but fell on the track with the child in her arms, losing her own life in the attempt, and the child sustaining the injury complained of. There was negligence on the part of Mrs. Farr, in this attempt to save the child, which contributed to the misfortune. In regard to the question whether the defendant was guilty of negligence, the facts were such, in the opinion of the judge at the trial, — consisting, in short, in the absence of a lookout

from the engine, — as to justify leaving the question to the jury. The jury found for the plaintiff and gave damages in $2500, and judgment was entered accordingly. Motion for a new trial for misdirection, the court having refused to charge the jury as requested by the defendant, reserving the points.

The District Court now overruled the motion for a new trial, Sharswood, Presiding Judge, delivering the following opinion: 'We think there was evidence of neglect in the servants of the defendants sufficient to justify the verdict. It is not necessary here to say whether a mere scintilla is enough. On that point the finding of the jury is approved by the judge before whom the trial was had.

'The question then reserved is simply this: assuming negligence on the part of the defendants, whether the negligence of a person who, without express authority from the parents, but as an act of kindness, takes charge of an infant child, contributing to the injury, is any defence in an action by the child? In this instance the unfortunate woman who laid hold of the child to carry it across the track, and who lost her own life in the attempt, was the aunt of the plaintiff. The plaintiff did not reside with the aunt, and no evidence was offered to show any authority over her. If, however, this was an action by the father to recover damages for the death of the child, a very different question would be presented. It would most probably be held that it was negligence to suffer such an infant to be on the streets without a care-taker, and he could not hold the defendants responsible, whether he had appointed a care-taker who was negligent or left the child to roam at large without one.

'To a child of plaintiff's years no contributory negligence can be imputed. Neither is the plaintiff precluded from recovery against one joint tortfeasor by showing that others have borne a share in it. All torts by several persons are joint or several at the election of the injured party, though but one satisfaction can be recovered, and there is no con-

tribution among tortfeasors. Hence springs the right of a plaintiff, who has recovered several verdicts against different defendants, to elect de melioribus damnis. There is nothing in the case to show that plaintiff could not have included her aunt as defendant with the company or their officers, or maintained a separate action against her. How then can she be barred from this action? The English case cited and relied on by the counsel of defendants [1] was the case of the negligence of the person in charge of a child, who had taken and paid for his passage with defendants, a railroad company, and while waiting in the depot to get on board the child was injured by the approach of another train, of which the defendants had given no notice. The defendants might well have said, we would not have received the child as a passenger without a care-taker, or if we had we would have put him in charge of a servant or in a place where no harm could come to him till the train was ready to start. The decisions of the New York and Massachusetts courts are certainly entitled to very high respect, but they are not authority binding upon us, and the precise point was not made or met in those cases. Hartfield *v.* Roper, 21 Wend. 615; Holly *v.* Boston Gas Co., 8 Gray, 123. In this decision we think that we are fully sustained by the opinion of our own Supreme Court in Smith *v.* O'Connor, 12 Wright, 218.

'Rule discharged, and judgment for plaintiff on points reserved.'

Writ of error by defendant.

Sharswood, J., for the court.— This judgment is affirmed on the grounds stated in the opinion of the District Court on the motion for a new trial. But as some views have been urged here which were not presented below, it is proper that they should not be passed without notice.

It has been strenuously contended that Mrs. Farr, whose negligence — resulting no doubt from want of presence of

[1] Waite *v.* Northeastern Ry. Co., El. B. & E. 719.

mind — contributed to the injury, was not a trespasser or tortfeasor. The evidence showed that the child was not under care, but that, with the best intentions and with the design to remove it out of the reach of danger, she attempted to cross the track of the railroad a few yards in front of the moving car, with the child in her arms, tripped and fell, which threw it under the wheel and caused the loss of its arm and the death of the unfortunate woman herself. It is supposed that as her intention was not to injure but to benefit the child, no action would lie against her. The law is clearly not so. An action can be maintained without regard to the motive, though no jury in such a case would give more than nominal damages. Nothing but necessity or inevitable accident excuses a trespass. In a case where the defendant was uncocking a gun, and, the plaintiff standing by to see it, it went off and wounded him, it was held that he might maintain trespass. Underwood *v.* Hewson, 1 Strange, 596. No man shall be excused of a trespass except it may be adjudged utterly without his fault; as if a man by force take my hand and strike another, or if the defendant should plead that the plaintiff ran across his piece when it was in the act of discharging, or set forth the case with the circumstances so as to make it appear that it had been inevitable and that he had been guilty of no negligence to give occasion to the hurt. Weaver *v.* Ward, Hob. 134. If one of two persons fighting unintentionally strikes a third, the absence of intention can only be urged in mitigation. Janes *v.* Campbell, 5 Car. & P. 372. If one does an injury by unavoidable accident, an action does not lie.[1] It is otherwise if any blame is imputable to him, though he be innocent of an intention to injure. Wakeman *v.* Robinson, 1 Bing. 213. The very foundation of the defence relied on by the plaintiffs in error was, that there was blame imputable to Mrs. Farr; that she was guilty of negligence which had contributed to produce the injury.

It has been urged however that if Mrs. Farr was a tort-

[1] See Brown *v.* Kendall, ante, p. 191.

feasor, then the only remedy of the defendant in error was against her; on the principle of Lockhart *v.* Lichtenthaler, 10 Wright, 151. It was decided in that case that where a passenger is injured by a collision resulting from the concurrent negligence of those in charge of the train in which he was, and of another party, the carrier alone is liable.[1] If the defendant in error had been in custody of a nurse or other person, to whose care she had been intrusted by her parents or guardian, there would be great force in this position. But there was no evidence of this. The mere relationship was not enough; nor did it appear that the parents had been accustomed to intrust the child to the care of the aunt. This then is like the case of a person who has been placed against his own will in a railroad car and receives an injury by the concurrent negligence of the carrier and of another party. The doctrine of Lockhard *v.* Lichtenthaler does not apply, as the reasoning of the present Chief Justice in the opinion and the authorities cited by him clearly show.

It was suggested also on the argument here, with great ingenuity and commendable zeal, that though there may have been negligence in the plaintiffs [2] in a general sense, it did not directly contribute to the injury, the proximate cause of which was the heedless conduct of the aunt. But if this was a case to which the maxim causa proxima non remota spectatur applied, it is very evident that the proximate cause was the motion of the train, and the negligence of the aunt the remote cause. But in truth the negligence of the plaintiffs was not mere negligence in a general sense, but contributed directly to produce the injury. That there was evidence of such negligence, not a mere scintilla but sufficient to go to the jury, cannot reasonably be questioned. The train was backing in a public street of a closely-built part of the city, at all times a dangerous operation, and requiring the exercise of great caution; the servants of the

[1] Sed qu. See Mills *v.* Armstrong, ante, pp. 575, 581.

[2] i. e., plaintiffs in error.

plaintiff were not on the lookout but were in such a position that they could not see any considerable distance in the direction of the motion; and there was contradictory evidence as to the rate of speed. The court below was right in submitting the cause to the jury, and the other errors assigned not having been sustained the judgment must be

Affirmed.

See Torts (Students' Series), 354–358.

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